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IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1972

No. [redacted]29

FRANK THOMAS and JEANETTE THOMAS, his wife, dba W. NEAHTUNA,

Appellants,

v.

EDWARD B. THOMPSON, as Attorney General of the State of Washington,

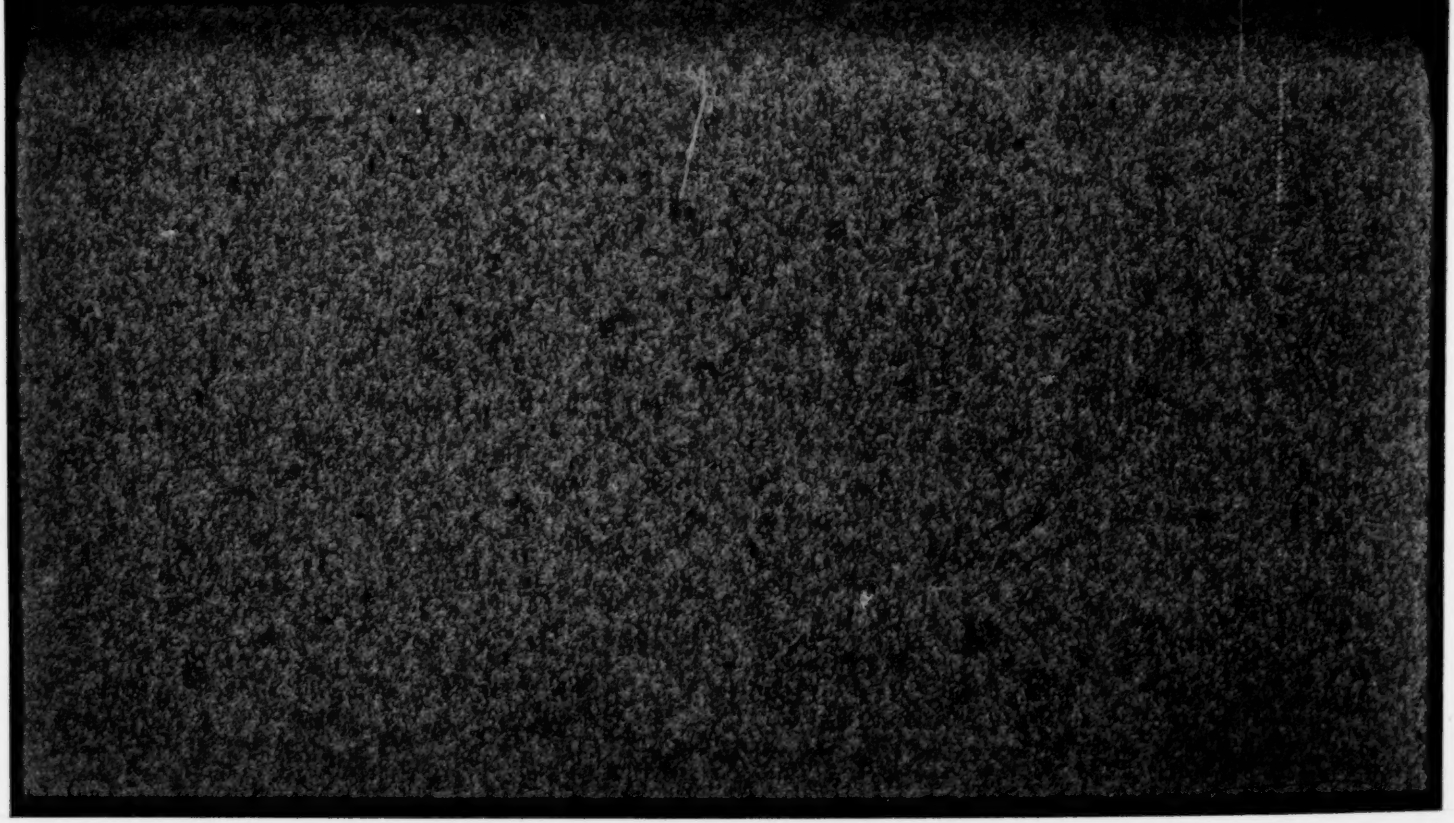
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEE

EDWARD B. THOMPSON,
Assistant Attorney General, State of Washington,
Solicitor for Appellee,

R. W. ANDERSON,
of Counsel.



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No. 302.

FRANK TERRACE and ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
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LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

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E. W. ANDERSON,
of Counsel.

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BRIEF OF APPELLEE

STATEMENT.

The detailed facts in this action are correctly stated by appellants, and a repetition thereof would be superfluous. Stated concretely, the abstract

question is whether the state of Washington may constitutionally prohibit the leasing of a tract of land to an alien Japanese for a term of five years, the lessee proposing to use the land for the purpose of raising agricultural products, such products to be sold by him, both at wholesale and retail, and also shipped in commerce, intrastate, interstate and foreign. The statute (ch. 50, L. of Washington 1921), which is set forth as an appendix to this brief, in addition to prohibiting the alien ownership of real property, likewise prohibits the acquiring of any right or benefit to the use, enjoyment, rents, issues or profits thereof, which would perhaps include the transfer of interests which would technically not constitute a leasehold interest. Section 11 of the act, however, provides:

"If any section or provision of this act shall be adjudged to be invalid or unconstitutional, such adjudication shall not affect the validity of the act as a whole or any section, provision, or part thereof not adjudged invalid or unconstitutional."

Since it does not appear that appellants propose to do anything concerning which the statute is material other than to execute an agricultural lease, the present inquiry is properly restricted to that situation and cannot extend to other questions which might possibly arise under the broad terms of the act.

ARGUMENT.

I.

The Jurisdiction.

It may well be doubted whether the allegations of the bill sufficiently show any justification for equitable relief, even if the statute be considered unconstitutional. The case involves but a single proposed transaction between the appellants, Frank and Elizabeth Terrace and N. Nakatsuka. So far as civil proceedings are concerned, the only remedy which the state has after the lease is executed is to bring an escheat proceeding. That proceeding would finally test and determine the validity of the act in the state courts, with the right of a writ of error to this court. In so far as any possibly criminal features are concerned, the only actions which could be instituted would be under section 7 of the act. This would make the appellants Terrace liable to criminal prosecution should they make the conveyance, but would not make the appellant Nakatsuka liable unless he should fail to disclose the fact that he holds such an interest to the prosecuting attorney or the attorney general under the provisions of subdivision (c) of section 7. An acquittal in a criminal proceeding would bar further prosecutions, because the offense is not a continuing one, and section 1 of Article I of the State Constitution of Washington provides that no person shall be twice put in

jeopardy for the same offense. Appellants do not sue in behalf of others similarly situated; neither does the case involve interference with a series of acts necessary to the conduct of a business, and therefore present a case for the intervention of equity to prevent multiplicity of actions. It simply involves the right of the state to prevent an isolated transaction, the legality of which may be finally determined in the state courts. It is submitted, therefore, that there is no jurisdiction in equity under the following decisions of this court:

Boise Artesion Water Co. v. Boise City, 213 U. S. 276;
Singer Sewing Machine Co. v. Benedict, 229 U. S. 481;
Dalton Adding Machine Co. v. Virginia, 236 U. S. 699;
Cavanaugh v. Looney, 248 U. S. 453.

Neither can the jurisdiction be sustained on account of the severity of the penalty, under the rule announced in *Ex Parte Young*, 209 U. S. 123. The penalty in this case is the same as that prescribed in the trading stamp act of Washington, which was sustained by this court in *Tanner v. Little*, 240 U. S. 269. In effect, this is merely a test suit to obtain the opinion of this court upon an abstract question of law. There is a complete and ample remedy to the appellants in the state courts, and no necessity for the exercise of equity jurisdiction.

II.

The State Constitution.

It is contended that under the provisions of section 33, Article II of the Constitution of Washington, the state has no power to prohibit leases of this character. Section 33, Article II of that instrument provides:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, That the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition."

This section was held by the supreme court of Washington to prohibit a lease of realty to an alien for ninety-nine years (*State ex rel. Winston v. Morrison,* 18 Wash. 664), and also one for forty-nine years (*State ex rel. Winston v. Hudson Land Co.,* 19 Wash. 35). In the first case the Washington court, more or less by way of dictum, said that "a lease of lands in this state to an alien for a reasonable term might be upheld." There is no reported case,

however, in which the Washington court has indicated the line of demarkation between a lease for a reasonable term which *might* be upheld, and one for an unreasonable term which will be held void. Neither has that court ever held that the legislature of Washington has no power to impose limitations upon the right of aliens to hold real property more restrictive than those contained in section 33 of Article II of the State Constitution. Appellants quote at length from the case of *Abrams v. State,* 45 Wash. 327, in which case the court merely held that the constitution did not prohibit an alien from acquiring an estate in fee simple by inheritance, a question obviously not material to the present contention.

The contention involves the construction and application of the Constitution of Washington. This court, therefore, is bound to accept the construction adopted by the highest court of that state as to the effect of this constitutional provision, whatever may be its own views with respect to the correctness of the conclusion reached.

Quong Ham Wah Co. v. Ind. Comm., 255 U. S. 445-448, and cases cited therein.

The supreme court of Washington, upon October 22, 1922, in the case of *State v. O'Connell,* sustained this act as not in conflict with either the State or the Federal Constitutions. The decision has not been officially reported, and for that reason we are printing the opinion as an appendix to this brief.

The *O'Connell* case involved the validity of a trust agreement by the terms of which certain land was deeded to two citizens of the state of Washington under a trust agreement which directed the trustees within twenty years to sell the land and distribute the proceeds in equal shares to a citizen and an alien beneficiary. It was argued in support of this agreement that its effect was to work an equitable conversion of the land into money under the doctrine announced by this court in the case of *Craig v. Leslie,* 3 Wheaton 563, and that consequently it was not a conveyance of real property under the Constitution, nor of an interest therein under the statute. The Washington court held the act applicable, even though it be conceded that an equitable conversion was worked. Referring to the Constitution, it said:

"Our constitution provides that 'the ownership of lands by aliens * * * is prohibited in this state * * *.' It was entirely within the province of the state legislature to determine by legislation what are lands, and when one becomes an owner thereof, within the meaning of the constitutional provision. In so doing, it has declared that 'land' 'does not include lands containing valuable mineral deposits,' etc., 'but does include every other kind of land and every interest therein and the right to the control, possession, use, enjoyment, rents, issues or profits thereof * * *' and it has said that ownership includes 'the right to any benefit of' lands."

In other words, the Washington court has held that the legislature of Washington may legally declare that the Constitution includes the right to any

benefit from realty. Obviously, it cannot be contended that the lessee does not possess such a right.

However, even if the question be considered as an original one, the same conclusion must follow. The only thing which section 33 of Article II, *supra*, does, is to prohibit the alien ownership of real property except in certain cases. Constitutional limitations upon legislative power are not to be implied. The only limitation which section 33 creates is the limitation that the legislature shall never thereafter permit the alien ownership of realty, except in the instances expressly described. The language of the section is prohibitory, and under ordinary rules of constitutional construction there is nothing upon its face which indicates an intent to prohibit the ordinary exercise of legislative power in cases not covered by the express prohibitions of the Constitution. In an attempt to meet this obvious conclusion, appellants argue "that the Washington Constitution is not drawn on the theory of being a limitation of legislative power, but that it is a mandatory direction in a large part, to the legislature to take affirmative action." This argument is ingenious, but the difficulty with it is that it is not in accord with the announced views of the supreme court of Washington, which is the final arbiter of the question. The best statement by that court is found in *State v. Ide,* 35 Wash. 576-584, where that court, in affirming the power of the legislature to impose a poll tax without express constitutional authority, said:

"Our constitution does not expressly mention such taxation, and, *as that instrument is not a grant of power, but a limitation of power inherent in the state, independent of that instrument,* it follows that this tax must be declared valid, unless the legislature was indirectly and by necessary implication prohibited from authorizing it to be levied by some provision of the constitution." (Italics ours.)

This quotation is set forth by the same court and approved in the recent case of *Nipges v. Thornton,* 206 Pac. 17, decided on April 8, 1922, where a similar conclusion upon similar facts was reached. See also *State v. Clark,* 30 Wash. 439-441.

The suggestion is also made that since the common law prohibits the alien ownership of real estate, section 33 is a nullity unless it be considered as abrogating the common law in instances not covered by express prohibitions contained therein.

The fallacy of this suggestion is apparent. Common law rules are observed by the courts in the absence of legislative action, and are subject to modification or complete abrogation by the legislative power. Without section 33, it would have been competent for the legislature of Washington to have entirely abrogated the common law relating to the alien ownership of realty by permitting such ownership. Section 33 prevented such action to the extent indicated, but it neither abrogated nor modified the common law nor curbed the legislative power except as it might thereafter seek to liberalize the common law in certain particulars.

The reason for the amendment will be found in an historical consideration of the situation which existed when the Constitution of Washington was adopted. Section 8775, Rem. 1915 Code of Washington, provides:

"Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, may acquire and hold lands, or any right thereto or interest therein, by purchase, devise, or descent, and he may convey, mortgage, and devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such lands shall be held conveyed, mortgaged, or devised, or shall descend, in like manner and with like effect as if such alien were a citizen of this state or of the United States."

This section was originally passed by the Territorial Assembly of Washington in 1864. Its effect as to aliens capable of becoming citizens was to entirely abrogate the common law in advance of naturalization. Section 33, *supra,* was evidently passed with the express purpose of repealing this section, in part, and not with the purpose of perpetuating the part left unrepealed as a part of the organic law of Washington.

III.

Due Process of Law.

It is argued by appellants that this transaction cannot be prohibited under the due process clause of the Federal Constitution.

This argument assumes the case to be determined entirely by the general rules which obtain in ordinary

police power cases. Even though that assumption be accepted, we think the legislative action under consideration is sustainable. Appellant's argument is based upon a supposed analogy between the situation of an alien who labors for wages in an ordinary occupation and one who, under a lease, obtains full dominion and control over a piece of realty for a limited period of time. It is said that if the right to engage in an ordinary gainful occupation cannot be denied to an alien, as was held in *Truax v. Raich,* 239 U. S. 33, that therefore he must also have a constitutional right to take a lease of land, since the taking of such a lease might be the means by which an alien gains his livelihood. This contention is elaborated by a number of imaginary situations in which aliens might desire to make arrangements of different kinds to work for farmers under various conditions of employment somewhat analogous in principle to the ordinary contract between master and servant.

The vice of the argument is two-fold: (1), it fails to distinguish between the particular thing here involved and the average occupation in which an alien might desire to engage, and (2), it is based upon too broad a conception of the scope of the due process clause with reference to aliens as applied in the *Truax* case, *supra.* That opinion clearly recognizes the fact that there are limitations upon the rule, and that where there is some relation between the public welfare and a special restriction sought to

be imposed upon an alien, the rule will not apply. The decision very carefully limits the effect of the rule. After referring to the decisions of the courts relating to the distribution of national resources in which special restrictions as to aliens had been sustained, Mr. Justice Hughes continued:

"The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein v. Lynham,* 100 U. S. 483; *Blythe v. Hinckley,* 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of *ordinary* private enterprise." (Italics ours.)

It will be observed that cases relating to the devolution of real property are expressly exempted and also that the court restricts the decision to the conduct of *ordinary* private enterprises. The same restriction appears upon page 41 of the decision, where it is said that the authority of the state to enact police power measures does not make it possible for the state to deny to aliens "the *ordinary* means of earning a livelihood." (Italics ours.) Again, the reservation is noted that there may be means of livelihood denied to aliens which citizens are permitted to follow. The thought is again repeated in the last paragraph of the opinion where it is said:

"No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates *to every sort.*" (Italics ours.)

The validity of the particular restriction now before the court therefore, if the act be considered as an ordinary police power measure, depends upon its relation to the public welfare and is not determined by any announced conclusions of this court with respect to the rights of aliens to follow other and different occupations. Concretely, the question is whether the court can say that the public welfare may not be injuriously affected by the leasing of real property to persons who owe to the state and nation no obligations of allegiance. Unless it can do so, this statute, in so far as this action is concerned, must be sustained.

Unlike many exercises of the police power, this prohibition is not the result of new and heretofore unknown economic or industrial conditions concerning which the court is compelled to judge by the exercise of its judicial knowledge, unaided by judicial precedent. While the common law cannot justify the denial of a constitutional right, the fact that both the common law and the statute are in accord affords a cognate reason why the statute should be sustained where the alleged constitutional prohibition is not specific.

The public policy of prohibiting the alien ownership of real property, except in very limited cases, has been an outstanding principle of the common law almost since its inception. Lord Coke, in Book 1-2b

of Coke Upon Littleton (Hargrave & Butler Ed.), states the rule as follows:

"If an alien Christian or infidel purchase houses, lands, tenements, or hereditaments to him and his heires, albeit he can have no heires, yet he is of capacitie to take a fee simple (1) but not to hold (2). For upon an office found, the king shall have it by his prerogative (3), of whomsoever the land is holden (4). And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king (5). If an alien purchase any estate of freehold in houses, lands, tenements or hereditaments, the king upon office found shall have them."

Blackstone has the following to say with respect to the same subject:

"An alien born may purchase lands, or other estates; but not for his own use; for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that, which he owes to his own natural liege lord: besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences." 1 Blackstone's Commentaries, p. 372.

See also:

2 Kent's Comm. 14th Ed. 53-64;
Kerr, Real Property, 215 *et. seq.;*
Tiffany, Real Property, 2350;
1 Stimson's Am. St. Law, 6013;
Stephens Comm. on Law of England, Vol. 1, p. 330-376;
Sedgewick, Trial of Title, 226;
1 Washburn, Real Property, 131.

In the case of *Halter v. Nebraska,* 205 U. S. 34-39, this court said:

"The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the states of the union have enacted statutes substantially similar, in their general scope, to the Nebraska statute. The fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the constitution of the United States."

Similarly in *Purity Extract & Tonic Co. v. Lynch,* 226 U. S. 192-204, it was said:

"That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other states and the decision of the courts in its construction" (Citing authorities.) "We cannot say that there is no basis for this widespread conviction."

See also:

German Alliance Insurance Co. v. Lewis, 233 U. S. 389;

Central Lumber Co. v. So. Dakota, 226 U. S. 157-160;

Noble State Bank v. Haskell, 219 U. S. 104;

Jacobsen v. Mass., 197 U. S. 11-34.

The application of this rule to the question of the desirability of allowing aliens to possess dominion over the soil will show that the preponderant public opinion of the county has always been opposed to this and that this opinion has been particularly intensified in recent years. At an early period in our

history when there was a large amount of vacant public domain, there appears to have been a difference of legislative opinion with respect to the wisdom of imposing special restrictions upon aliens in this regard. According to a note appended to the Fifth Edition of Wheaton on International Law, page 138, in 1873, Ohio, Michigan and Illinois imposed no such restrictions; Vermont, North and South Carolina required residence and the taking of the oath of allegiance, while in Connecticut, Maine, Delaware, Maryland, Virginia, Tennessee, Arkansas, Indiana and Missouri the filing of a declaration of intention was required before title to realty could be held by an alien. The other states appear to have been content to follow the common law which, as we have already shown, prohibited alien ownership. In recent years, however, many states have by express statutory or constitutional enactment, expressly imposed these restrictions. We have already adverted to the Constitution of Washington which was adopted in 1889. In 1913, California adopted chapter 113, Laws of 1913, which prohibited ownership but permitted leases for terms of three years. This appears to have been found insufficient by the people of California, and consequently, in 1920, Initiative Measure No. 2, was adopted by a popular vote of 668,483 in favor of the measure, and 222,086 opposed thereto. An illustration of the trend of the times is found on an examination of the action taken by the various states in the year 1921. In that year the states of Wash-

ington, Arizona, Delaware and Texas all enacted laws relating to this same general subject. Chapter 50, Laws of Washington of 1921; Chapter 29, Laws of Arizona of 1921; Chapter 188, Laws of Delaware of 1921; Chapter 134, General Laws of Texas of 1921.

In addition to this, during that year preliminary steps were taken to submit to the people of Colorado, Louisiana, Nevada and New Mexico the question of whether constitutional amendments should not be adopted to place aliens under disabilities similar to those imposed by chapter 50, *supra.* Laws of Colorado for 1921, p. 172; Substitute Ordinance No. 452 of Louisiana, approved by the Constitutional Convention of 1921; Laws of Nevada, 1920-21, p. 416; Joint Resolution of New Mexico Legislature of November 9, 1921. The following states by statute have also adopted the rule of the common law to a more or less extent: Illinois, Cahill's Revised Statutes 1921, chapter 6; Indiana, 2 Burns' Statutes 1914, sections 3943-44; Nebraska, section 5687, Compiled Statutes.

Congress has also recognized the necessity for some regulation, although not to as great an extent as have the states. Section 2289 of the Revised Statutes, since its original enactment in the Act of May 20, 1862 (sec. 4530, U. S. Comp. Stat. 1916) has always limited the right to appropriate the unoccupied public domain to citizens or to persons who have filed declarations of intention to become such.

The Act of March 2, 1897 (29 Stat. 618), relating to the ownership of land in the territories, permitted bona fide resident aliens to hold realty, but prohibited its ownership by all other aliens, and further provided that the removal of a resident alien should subject his realty to escheat by the Government if not sold within ten years after the date of such removal.

The Act of April 30, 1900 (31 Stat. 154), providing for the organization of the Government of the Territory of Hawaii, prohibited the conveyance of any interest in realty in the public domain of Hawaii to aliens who had not filed declarations of intention.

It might be noted in this connection that according to Mr. J. E. DeBecker, an authority quite widely known, in his "Annotated Civil Code of Japan," Volume 1, pages 7, 238 and 242, aliens are not permitted to own real property in Japan, and neither are they permitted to lease for agricultural purposes, although Mr. DeBecker adds that an imperfect act modifying the restrictions was recently passed by the Japanese Parliament, but has not been promulgated by the Emperor.

This course of legislation indicates a uniform popular view that the public welfare is directly affected by the alien ownership of realty. It is particularly noteworthy that the most drastic action in this regard has been taken by those states in which there are found large bodies of aliens who are not permitted by Congress to become naturalized. Pre-

sumably, this legislation is the result of experience and of a more intimate knowledge of local conditions than the court can obtain by the exercise of its judicial knowledge. The language of this court, in the case of *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112-160, while addressed to a different question, seems to be peculiarly applicable to a consideration of the view announced by the people of California when they voted upon the initiative measure heretofore referred to. In that case this court said:

"The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject, and with the necessities and the occasion for the irrigation of lands than can anyone who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of facts which surround the subject in their own state. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that state on this question."

While this court does not appear to have even expressly considered the question of whether the Fourteenth Amendment abrogates the common law rule, it has consistently recognized the existence of the power of the various states in a considerable number of cases, a procedure necessarily inconsistent with the view that the Constitution in any way oper-

ates to curb the state police power upon the subject. The leading case is curiously the first case. We refer to the decision in *Fairfax v. Hunter's Lessee,* 7 Cranch. 603. In that case it was held that a devise made to an alien was good until office found by the state. The court, however, in an elaborate opinion, approved the proposition that an alien could take neither by a devise, inheritance or purchase against the sovereign power. We quote from page 619:

"It is clear by the common law, that an alien can take lands by purchase, though not by descent; or in other words he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the year books, and has been uniformly recognized as sound law from that time. 11 Hen. 4, 26, 14, Hen. 4, 20. Co. Litt. 2 b. Nor is there any distinction whether the purchase be by grant or by devise. In either case the estate vests in the alien. Pow. Dev. 316, etc. Park. Rep. 144. Co. Litt. 2 b, not for his own benefit, but for the benefit of the State; or in the language of the ancient law, the alien has the capacity to take, but not hold lands, and they may be seized into the hands of the sovereign. 11 H. 4, 26. 14 H. 4, 20. But until the lands are so seized, the alien has complete dominion over the same. He is a good tenant of the freehold in a precipe on a common recovery. Goldsb. 102. 10 Mod. 128. And may convey the same to a purchaser. Sheafe v. O'Neile, 1 Mass. Rep. 256. Though Co. Litt. 52 b. seems to the contrary, yet it must probably mean that he can convey a defeasible estate only, which an office found will divest. It seems indeed to have been held, that an alien cannot maintain a real action for the recovery of lands. Co. Lit. 129 b. Thel. Dig. ch. 6. Dyer, 2 b. but it does not then follow that he may not defend, in a real action, his title to the lands against all persons but the sovereign."

Although this case was decided before the adoption of the 14th amendment, it was cited several times with express approval after 1870, as will hereafter appear.

In *Chirac v. Chirac,* 2 Wheat. 259, decided in 1817, this court held that a treaty with France gave an alien the right to inherit certain real property, but at the same time it accepted without dissent, the point made by the plaintiff in error that in the absence of a treaty the property of the deceased went to the state "because it was acquired before he became a citizen of the United States."

In *Orr v. Hodgson,* 4 Wheat. 452-463, it was held that the heirs of an alien could not inherit real property in the absence of treaty provisions by reasons of the common law.

In *Hauenstein v. Lynham,* 100 U. S. 483, the question was re-examined and the *Fairfax* case, *supra,* expressly affirmed in the following language:

"The common law as to aliens, except so far as it has been modified by her legislature, is the local law of Virginia. 2 Tucker's Blackst. App., Note C. By that law 'aliens are incapable of taking by descent or inheritance, for they are not allowed to have any inheritable blood in them.' 2 Bla. Com. 249. But they may take by grant or devise though not by descent. In other words, they may take by the act of a party, but not by operation of law; and they may convey or devise to another, *but such title is always liable to be devested at the pleasure of the sovereign by office found.* In such cases the sovereign, until entitled by office found or its equivalent, cannot pass

the title to a grantee. In these respects there is no difference between an alien friend and an alien enemy. *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch. 603.

"The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. Vattel, book 2, c. 8, sect. 114. In our country, this authority is primarily in the States where the property is situated." (Italics ours.)

In *Atlantic & Pacific Ry. Co. v. Mingus,* 165 U. S. 413-432, the *Fairfax* case was cited as sustaining the power of the sovereign by legislative act to declare a forfeiture instead of by the common law procedure of office found. The same conclusion was reached in *Taylor v. Benham,* 5 Howard 232-270. Likewise in *United States v. Repentigny,* 72 U. S. 211, it was stated that Congress might, by a general act, divest aliens of any rights which they might have in real property instead of requiring judicial proceedings. We quote from page 268:

"A legislative act, directing the possession and appropriation of land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government without these preliminary proceedings. *Fairfax v. Hunter,* 7 Cranch. 603."

In *Blythe v. Hinckley,* 180 U. S. 333, the same doctrine was announced. In *Truax v. Raich,* 239 U. S. 33, this court, in declaring unconstitutional an

Arizona law prohibiting the employment of aliens at the same time observed that the case was not within the decisions relating to the devolution of real property, and finally in the case of *Sullivan v. Kidd,* 254 U. S. 433, it was said:

"Primarily the devolution of the estate, it being situated in the state of Kansas, would be determined by the laws of that state."

See also:

Geoffrey v. Riggs, 133 U. S. 258;
Donaldson v. State, 101 N. E. 485;
22 R. C. L. 83;
2 C. J. 1048;
Jones v. Jones, 234 U. S. 615.

The common law rule was likewise in accord with the law of nations as recognized by all civilized countries. In Wheaton's International Law, 5th Ed., page 132, the author quotes the following from Foelix, Droit International Prive, section 9:

"Every state possesses the power of regulating the conditions on which the real or personal property, within its territory, may be held or transmitted, and of determining the state and capacity of all persons therein, as well as the validity of the contracts and other acts which arise there, and the rights and obligations which result from them * * *."

Vattel, in his Law of Nations (Chitty's Edition), at page 177, thus states the rule:

"Every state has the liberty of granting or refusing to foreigners the power of possession *lands* or other immovable property within her territory. (117) If she grants them that privilege, all such

property possessed by aliens remains subject to the jurisdiction and laws of the country, and to the same taxes as other property of the same kind. The authority of the sovereign extends over the whole territory; and it would be absurd to except some parts of it, on account of their being possessed by foreigners. If the sovereign does not permit aliens to possess immovable property, nobody has a right to complaint of such prohibition; for, he may have very good reasons for acting in this manner: and, as foreigners cannot claim any right in his territories (sec. 79), they ought not to take it amiss that he makes use of his power and of his rights in the manner which he thinks most for the advantage of the state. And, as the sovereign may refuse to foreigners the privilege of possession immovable property, he is doubtless at liberty to forbear granting it except with certain conditions annexed."

While it is true that none of these cases specifically cover leases, nevertheless the distinction seems to be immaterial. The cases are premised upon the rule of the common law. That rule is stated in Book 1-2b. of Coke Upon Littleton, as follows:

"But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods and the like. For if he take a lease for yeares of lands, meadows, etc., upon office found, the king shall have it (6). But of a house for habitation he may take a lease for yeares as incident to commerce; for without habitation he cannot merchandize or trade (7). But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king (8); for he had it only for habitation as

necessary to his trade or traffique and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for years, albeit it were for his habitation (9); and so it is if he be an alien enemie. And all this was so resolved by the judges assembled together for that purpose in the case of Sir James Croft, Pasch. 29, of the raigne of queene Elizabeth."

Blackstone reaches the same conclusion in this language:

"For he may purchase anything; but after purchase he can hold nothing except a lease for years of a house for convenience of merchandise, in case he be an alien friend; all other purchases (when bound by an inquest of office) being immediately forfeited to the king." (I Blackstone's Commentaries, Cooley's Ed., p. 669).

It seems apparent that if the power to prohibit the holding of the fee simple title by an alien rests in the police power, then the same rule would, of course, apply to leases, because a lease does not differ from a conveyance in fee except in the length of tenure and the power of disposition.

Aside from precedent, however, the reasons for the restriction are not difficult to suppose. Some of them were well stated by the trial court, where it said:

"It is obvious that one who is not a citizen and cannot become one lacks an interest in and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or

own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged.

"This is no new thing. Tribal laws of the progenitors of the Anglo-Saxons, while still upon the continent, made an estate in lands, similar to a freehold, a prerequisite to a voice in the tribal government. The 'free-neckedman,' or 'freeman,' was synonymous with 'freeholder.' They were interdependent. A freeman had a vote in determining tribal policies and no one was a freeman without an estate in lands. (Green's History of the English People, Book 1, Chap. 1, subhead 'The Land.') The recognition of this principle has run throughout the history of our race and its governments." (Record, 21.)

Substantially, all human activities are carried on upon the earth, and since, in the language of Vattel "nations or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength," the same thing may be said of states. The prosperity of the state, however, cannot rest entirely upon obligations imposed by criminal statutes or mandatory legislative commands, but must also rest upon moral and unwritten obligations which are the incidents of citizenship and national allegiance. The possession of the soil by persons who recognize no such obligations but who are bound

only by specific statutory mandates, and even as to some of these, the rules of international law relieve them, thus has a direct and obvious relation to the public welfare. This must be so because the welfare of the state directly depends upon the way in which the land from which it draws its very existence, is used. The importance of this is more marked in a nation whose governmental power is restricted by constitutional limitations than in an autocratic community, because in such a nation the possession of the soil by the individual carries with it the certain rights of immunity from governmental action which can be claimed to the possible detriment of the state. The fact that there is no relation betweer the employment of aliens in ordinary transitory occupations and the public welfare by no means compels the same conclusion where there is involved sovereignty over the soil, a thing upon which our political existence may well depend. The contention that because the situations have a surface similarity and that therefore the Fourteenth Amendment operates in the same degree in both instances, is simply another one of the oft-repeated attempts to define and limit the police power by specific definition and limitation. This court has always consistently refused to do this, since its decision in *Munn v. Illinois,* 94 U. S. 113, but has always decided each case upon its own particular facts.

Neither has it restricted the police power to emergency regulations, such as health measures, but

it has extended it to include measures designed to subserve the public welfare and prosperity.

Barbier v. Connolly, 113 U. S. 27;
C. B. & Q. R. R. Co. v. Ill., 200 U. S. 561;
Central Lumber Co. v. So. Dak., 226 U. S. 157.

The intimate relation between the ownership of soil and the public welfare and prosperity of the people of the state is not hard to see. The entire political and economic fabric of the state is finally dependent upon the soil, and particularly that portion which is used for agriculture, which is the question herein involved. The ownership of large parcels of realty by aliens may be dangerous to the public welfare of a state for many possible reasons. Some of them may be suggested:

1. It diverts from local use and local enjoyment a large part of the net revenues of the land which would otherwise accrue to the benefit of the people of the state and future generations;

2. It promotes racial dissention and thereby menaces the public safety;

3. It permits the land upon which the state depends to be used in such a manner as to impair its use for future generations, because presumably the alien tenant or proprietor has no interest in the perpetuity of the state;

4. It exposes the citizen owners of land to competition which they are often unable to meet, to the consequent detriment of the state, since the true pros-

perity of the state always depends upon the prosperity of its citizens;

5. It places the consuming public at the mercy of alien races who are apt in times of international disturbance to return to the country of their origin and thus interrupt and paralyze the entire industrial and social life of the state; and

6. It may well deprive the state of important and necessary aid and assistance in time of war.

It is not necessary for the court to conclude that all or any of these things will actually occur if restrictions are not imposed. Unless it can see that some or all of them may not, in fact occur, the legislative action must be sustained, because the legislature, and not the court, is the judge of the necessity of regulation under the police power unless the court can judicially know that there could, under no possibility, be any occasion for that exercise.

Munn v. Illinois, 94 U. S. 113-132;
Otis & Gassman v. Parker, 187 U. S. 606-609;
Atkin v. Kansas, 191 U. S. 207-222;
Railway Co. v. May, 194 U. S. 267-269;
McLean v. Arkansas, 211 U. S. 539-548.

It will probably be said in response to this that some of these reasons, such as the economic competition of foreign labor, might have been urged in support of the act declared invalid in *Truax v. Raich, supra.* We think that possibility would not dispose of the question. Once within our borders, an alien cannot be deprived of the right to live, and to live he

must labor or be supported by the charity of others. An interference with that right under the police power is, therefore, subject to certain limitations, the exact nature of which need not be specifically designated. The Arizona statute applied to all occupations, irrespective of their nature. The practical effect of this, as was pointed out in the opinion, was to exclude aliens from the state, a subject entrusted to Congress. The opinion did not hold that within certain limits the police power might not be exerted for the purpose of protecting the citizens of a state from the economic competition of races who have a standard of living inconsistent with American ideals, or to conserve our natural resources for our descendants. Obviously, such a conclusion would be difficult to reconcile with the oft-repeated statement of this court that the police power extends to the promotion of the general public welfare and prosperity.

Neither is the possible effect of such a condition restricted to the persons with whom the alien may come in competition. The so-called Japanese problem illustrates this quite fully. We need quote no authority to the point that in the field of agriculture the American and the Oriental cannot compete. This is so because their standards of living are incomparably different. The Oriental works his wife and his family in the fields practically during the hours of daylight, and his standard of living could not be adopted by an American. The possible result of such a condition would be that in the course of time, in

certain sections of the country, at least, all lands might pass into the hands of these classes of aliens. The people of the state would then be entirely dependent for their very existence upon alien races who recognize to the state or nation no other obligations than those forcibly imposed. A change in a foreign government; a war in distant portions of the earth, and these people—as some of them have in fact done since the last war—would return to the country of their origin. The disastrous effect upon the whole economic fabric of a state of such a possibility is not hard to foresee. This possibility is in addition to the equally detrimental effect of driving American farmers from the occupations to which they have been accustomed into other and different businesses. Surely these are possibilities which the Fourteenth Amendment does not prohibit the state from guarding against.

Appellants do not directly controvert the foregoing, but seek to avoid its effect by a considerable discussion of the question of whether, under the laws of Washington, a lease creates an interest in real estate, contending that it does not. We are unable to see the materiality of this discussion. If the case is to be determined in the light of the police power cases, then the statute must stand or fall, as the court may determine its necessity with respect to the public welfare. In such event it can make no difference whether a lease be viewed as an interest in realty or as personal property, any more than the legality of a

tax, claimed to constitute a burden upon interstate commerce, is determined by the view of a state court with respect to its being an excise tax or a tax on property.

Standard Oil Co. v. Graves, 249 U. S. 389, 394.

In so far as the Federal Constitution is concerned, the law is tested by what is done and not by what the local law may regard it for other purposes.

In any event, however, appellants are mistaken in their view of the nature of a lease of realty under the laws of Washington, because such leases have always been regarded in that state as constituting the conveyance of an interest in land. Appellants' position is predicated upon the case of *Tibbals v. Iffland,* 10 Wash. 451, in which case it was held that under the community property law of Washington a wife does not have to join in an *assignment* of a lease of a store room. In reaching the conclusion which it did, the Washington court distinguished between an assignment of a lease and the making of such a lease, because at page 455 of the opinion it said:

"Leases of real estate for more than one year, *being incumbrances upon the property demised,* must, under our statutes, be created by deed and with the usual formalities of deeds." (Italics ours.)

There are two factors by which we may determine the nature of a lease in Washington: (1) the statute of frauds, and (2) the application of the rule of community property. Section 8745, Rem. 1915 Code, provides:

"All conveyances of real estate or *of any interest therein,* and all contracts creating or evidencing any incumbrance upon real estate shall be by deed."

Section 5918, Rem. 1915 Code, provides, in part:

"The husband * * * shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife."

Construing section 8745, *supra,* the Washington court has consistently held that a lease, being an incumbrance on real estate, is within the statute.

In *Richards v. Redelsheimer,* 36 Wash. 325, this conclusion was reached in the following language:

"It is apparent, from the provisions of section 4517 (8745), that the common law has been modified to the extent of providing that all conveyances of real estate, or of any interest therein, or contract evidencing any incumbrance thereon, shall be by deed."

See also:

Watkins v. Balch, 41 Wash. 310;
Dorman v. Plowman, 41 Wash. 477.

In *American Savings Bank & Trust Co. v. Mafridge,* 60 Wash. 180, it was held that a contract for a lease was within the statute, but that an assignment of the lease was not so included. From these decisions it is apparent that the *Tibbals* case was not decided upon the theory that a lease does not create

an interest in real property, but simply upon the peculiar provisions of the statute relating to community property.

In *Hoover v. Chambers,* 3 Wash. Ter. 235, a lease on land was held to constitute an incumbrance within the meaning of the community property statute, and that therefore a contract by a married man to make a lease upon community real estate without the joinder of his wife, was invalid. This question was again considered in *Spreitzer v. Miller,* 98 Wash. 601, in which case it was held that where the wife fails to join in the execution of a lease, the lease cannot be sustained. The same view was announced in *Mustar v. Russell,* 20 Wash. Dec. 199-203, in which it was said:

"It will not be contended that a contract to erect a building upon real property and make a lease thereof for a period of ten years is valid under the statute of frauds unless it be in writing."

Since the statute of frauds of Washington is restricted to real estate or any interest therein, or incumbrance thereon, and the community property statute refers to the sale, conveyance or incumbrance of real property, and since both statutes have been held applicable to leases of realty, it cannot be denied that the local law of Washington establishes the fact that a leasehold interest is an interest in land. This conclusion is in accord with the views of this court in the following cases:

Freeman v. Dawson, 110 U. S. 264-272;
Insurance Company v. Haven, 95 U. S. 242.

We have discussed this question as though it were an ordinary police power case. While we think that it can be sustained as such, it is nevertheless submitted that in any event the power which has been exercised here and validity of which is attacked, is a broader power than exists where there is involved merely the right of a citizen to follow the the ordinary pursuits of life in which the state has no special interest. The power to prevent the alien dominion of our soil is the necessary result of our political existence. It need not be justified by concrete instances of apprehended dangers, as we have attempted to do in an excess of caution, but should simply be recognized as one of the necessary incidents of governmental existence. Every writer on the law of nations and all civilized countries have recognized its existence since the beginning of history. It is a part of the sovereignty of a state, and of a kind, we submit, never intended to be taken away by the Fourteenth Amendment.

IV.

Equal Protection of the Laws.

An elaborate argument is made by appellants with respect to the alleged discriminatory features of this statute which the simplicity of the question seems to make in a large part unnecessary. The act classifies all persons into two classes: (1) citizens and aliens who have in good faith declared their intention of becoming citizens, and (2) un-

naturalized aliens and those whose declarations of intention have not been made in good faith. Persons belonging to the second class are prohibited from holding land or any right to the rents, issues and profits thereof.

It is said that because section 2169, Revised Statutes (18 Stat. 316) restricts the right of naturalization to aliens who are free white persons and persons of African nativity or African descent, that therefore the act unlawfully discriminates against the members of those races who are excluded from the privilege of naturalization by the section.

A consideration of a classification based upon the police power always involves two inquiries: (1) Is the act within the police power, and (2) If so, does it so discriminate with respect to persons affected thereby as to deny the equal protection of the laws to those included? We have already considered the statute from the standpoint of the police power. The decisions of this court to which we have referred sustain beyond question the power of a state to prohibit the alien ownership of real property. These decisions can only be supported upon the theory that the public welfare demands that persons who are not at least morally bound by the obligations of citizenship shall not be permitted to exercise privileges which have so intimate a connection with the public weal. The mere statement of the cause for the exercise of the power in this instance would seem to prevent any question of classification from

arising because the statute includes the entire field which occasioned the exercise of the power. Apparently conceding the general power of the state to classify all aliens in this particular way, the appellants seek to avoid the application of the rule by adverting to the fact that section 2169 discriminates against certain races, and it is claimed that the result, in so far as the state statute is concerned, is therefore that aliens, who may possess the same characteristics which make for as good citizenship as those to whom the privilege is extended, are denied the equal protection of the laws.

This may be easily answered, both by precedent and upon principle. From the passage of the Act of March 26, 1790 (1 Stat. 103) to the Act of July 14, 1870 (16 Stat. 254), the privilege of naturalization was restricted to free white persons. In 1870, this privilege was extended to the negro, but the members of the Mongolian and Malay races have always been excluded from naturalization from 1790 to the present time.

Ozawa v. U. S., U. S. Sup. Not yet reported.
In Re Saito, 62 Fed. 126;
In Re Kumagai, 163 Fed. 922;
In Re Knight, 171 Fed. 299;
In Re Young, 195 Fed. 645;
In Re Ozawa, 4 Hawaii Dist. 643.

While the decisions of this court with respect to the alien ownership of real property heretofore referred to do not refer to the classification then

existing under the naturalization laws, the same alleged discrimination did, in fact, exist, and the statements made therein were all erroneous if appellant's view be adopted.

Considered from the standpoint of principle, the error in the argument lies in the failure of appellants to correctly understand the reason for the rule. The justification for the act under the police power does not rest upon the racial characteristics of various races or upon the idea that the excluded classes may not be law abiding and industrious, as seems to be assumed by the appellants. If this were so, the contention might merit serious consideration. The regulation is occasioned by the legislative view that persons who are not at least morally bound by obligations of citizenship should not be permitted to obtain control of a thing so vital to the political existence of a state as is the land. The question of whether certain persons should be permitted to assume those obligations is entirely legislative, and consequently immaterial here. It is sufficient that Congress has refused to extend those privileges to certain races. It is no reflection upon the members of those races to say that having so acted, we cannot reasonably expect from them anything more than obedience to the letter of the law. In so far as the public welfare is concerned, however, it can make no difference whether their refusal to recognize those obligations is occasioned by deficiencies in their character or by an act of Congress. The result is the same in either

case in so far as the public welfare of the state is concerned; that is to say, a thing upon which the state depends for its existence passes into the hands of persons who recognize no voluntary obligations to it.

The police power of the state extends to all subjects which affect the public welfare and the alleged fact that if the national government had acted differently, the occasion for the exercise of the power would not have arisen is of no relevancy. This factor marks the distinction between the case of *Truax v. Raich, supra, Yick Wo v. Hopkins,* 118 U. S. 356, and various decisions of state and lower Federal courts holding invalid attempts to deprive aliens of the right to engage in various occupations and the case at bar. The case of *Yick Wo v. Hopkins, supra,* is illustrative of this difference. In that case it was made to appear that an ordinance, prohibiting the maintenance of hand laundries in wooden buildings without the consent of certain municipal officers, had been construed as permitting those officers to refuse permits to Chinese, while at the same time giving them to all other persons similarly situated. This action was clearly discriminatory, because there is nothing in the business of maintaining a hand laundry in a wooden building which, of itself, has any relation to the public welfare. The only basis for classification there was the method of carrying on the occupation, a circumstance not related to citizenship.

In the present case, the necessity for the state action is occasioned by the very thing upon which the classification is based, which is quite a different question. Similarly, the statute considered in *Truax v. Raich* was discriminatory, because it sought by a classification based upon citizenship to establish a prohibition with respect to occupations in which the presence of aliens could have no relation to the public welfare. A review of all the decisions cited by appellants upon this point would serve no useful purpose. They either merely involve the application of general principles to different situations, or else are cases involving general occupations in which the participation of aliens could not possibly be detrimental to the public welfare. We have already shown that such is not the situation with respect to the present statute.

It is also argued that in any event, an arbitrary classification is made because aliens who have in good faith declared their intention to become citizens are permitted to hold real estate, whereas the same privilege is denied to all other aliens. The fallacy of this argument is apparent if the grounds for the classification which we have heretofore suggested be accepted. Declarants in good faith are included in the same class as are citizens, because they have taken the preliminary steps looking to citizenship and presumably will, in due course, attain that citizenship. The danger to the public welfare incident to the ownership of real property by persons of this class

may therefore be reasonably said to be less than in the case of those aliens who have taken no steps looking to the abandonment of their obligations of allegiance to other governments. The fact that to a more or less extent the same danger may be common to two classes of persons would not for that reason render a regulation directed at one class only void, under the numerous decisions of this court. The case of *Patsone v. Pennsylvania,* 232 U. S. 138, is peculiarly applicable. A statute of Pennsylvania made it unlawful for "unnaturalized foreign born alien residents" to possess certain weapons, but did not apply to nonresident aliens. Answering the contention that this was an unlawful discrimination, this court said:

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. *Lindsley v. National Carbonic Gas Co.,* 220 U. S. 61, 80, 81. The state 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' "

Similarly, in *Central Lumber Co. v. So. Dakota*, 226 U. S. 157-160, this court said:

"If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists *without covering the whole field* of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." (Italics ours.)

In *Miller v. Wilson*, 236 U. S. 373, this court, in sustaining a statute of California which provided for an eight hour day for women but exempted from its operation women employed in certain industries, said:

"The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. *Patsone v. Pennsylvania*, 232 U. S. 138, 144, 58 L. ed. 539, 543, 34 Sup. Ct. Rep. 281. It is free to recognize degrees of harm, *and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.* As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.' *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Consol. Coke Co. v.*

Taylor, 234 U. S. 224, 227, 58 L. ed. 1288, 1289, 34 Sup. Ct. Rep. 856." (Italics ours.)

In *Keokee Coke Co. v. Taylor,* 234 U. S. 224, a statute which prohibited certain businesses from issuing store orders to employees but which did not apply to all employments, was held not discriminatory in the following language:

"But while there are differences of opinion as to the degree and kind of discrimination permitted by the 14th Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating *other instances to which it might have been applied equally well,* so far as the court can see. That is for the legislature to judge unless the case is very clear." (Italics ours.)

See also: *International Harvester Co. v. Missouri,* 234 U. S. 199.

Under these authorities it seems apparent that if the reason for the existence of this power which we have suggested be accepted, then there can be no substantial question with respect to classification. This is so because there is an obvious difference between the service to the state to be expected from a person who has been permitted in a formal way to declare his intention to abandon his allegiance to another nation and one who has not taken that step. As we have heretofore pointed out, the fact that his failure to take the step may be occasioned by the action of the National Government would not in any wise affect the question, and indeed, might, by the

creation of a feeling of resentment make the necessity for the restriction more urgent.

In brief, the position taken by appellants, if correct, modifies all restrictions in all the states of the United States upon the alien ownership of real property so long as Congress does not see fit to extend to all aliens the right of naturalization. This conclusion would necessitate a reversal of a long and uniform line of decisions by this court in which the power to make this restriction has been consistently affirmed, and to impute to the framers of the 14th Amendment an intent to impose upon governmental sovereignty a restriction never recognized by any civilized nation.

V.

The Treaty.

Article I of the Treaty of Commerce & Navigation with Japan (37 Stat. 1504), provides:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

It is claimed that the application of this statute to the situation described in the bill of complaint is

violative of this Treaty. The bill shows that the land involved is agricultural land, and that the appellant Nakatsuka is a farmer who desires to use the land for the purpose of raising agricultural products to be sold by him both at wholesale and retail, and also that he is engaged in trading in farm products, both at wholesale and retail. Disregarding for a minute the alleged fact that Nakatsuka is both a farmer and a produce dealer, and considering the treaty as applied to the right to lease lands for agricultural purposes, the non-application of that instrument is at once apparent. The treaty deals specifically with the matter of leases. It gives to the subjects of the contracting parties the right "to lease land for residential and commercial purposes." Clearly, therefore, it was not the view of the signatories to that instrument that the matter of leasing was included within any other article nor was it the intention to permit the leasing for all purposes, else the treaty would have so provided, instead of specifically designating the purposes for which leases might be made. The bill concedes that the land is not proposed to be leased for residential purposes. If an agricultural lease is included, therefore, it must be included upon the theory that the raising of agricultural products is commerce. If this be true, then it is difficult to imagine any purpose which would not be included, save perhaps leases to eleemosynary institutions or for charitable purposes, a violent construction indeed. While it is true that treaties should be liberally

construed in order to effectuate the intention of the parties, it is also true "that in their construction words are to be taken in their ordinary meaning." *Geoffrey v. Riggs*, 133 U. S. 258. Agriculture and trade and commerce have always been understood as constituting separate and distinct occupations. This popular conception has been expressed in instances too numerous to enumerate. Congress has recognized the distinction by the creation of the Department of Commerce & Labor and the Department of Agriculture. Many of the state governments have likewise created separate departments regulating agriculture. Legislation, both state and Federal, has uniformly treated the two occupations as distinct. It is unnecessary, however, to cite individual instances, because the question has already been determined by this court. Whatever may be the degree of liberality which should be exercised in the construction of treaties, it certainly is not any greater than is applied in the consideration of the powers of Congress under the commerce clause.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186;

Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211;

Texas & P. Ry. Co. v. Rigsby, 241 U. S. 33.

This court has uniformly held that the power delegated to Congress to regulate interstate commerce does not include the right to regulate the manufacture of commodities, although intended for subse-

quent transportation in interstate commerce, either by direct regulation or by the prohibition of movements in interstate commerce.

In *Kidd v. Pearson,* 128 U. S. 1, it was declared that the manufacture of intoxicating liquor was not commerce, although intended to be subsequently moved in that commerce. It was there said:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term as given by this court in *County of Mobile v. Kimball,* 102 U. S. 691, 702 (26: 238, 241), is as follows: 'Commerce with foreign Nations and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does

not the wheatgrower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management."

In *United States v. Knight,* 156 U. S. 1, this court held that the Sherman Anti-Trust Act did not apply to a combination formed by a number of sugar refining companies to restrain competition in the production of sugar for the reason that the manufacture of sugar was not commerce. It was said in the opinion:

"Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."

Consequently, in *Capital Dairy Co. v. Ohio,* 183 U. S. 238-245, it was held that a state statute which prohibited the manufacture of oleomargarine did not controvert the commerce clause.

In *Hammer v. Dagenhart,* 247 U. S. 251-272, this court declared void an act of Congress which sought to restrain the movement in interstate commerce of

manufactured articles produced under certain conditions. Mr. Justice Hughes there said:

"The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof."

See also:

Delaware L. & W. Ry. Co. v. Yurkonis, 238 U. S. 439;

Crescent Cotton Oil Co. v. Miss., 66 L. Ed. 55-57.

No good reason can be perceived why these cases are not equally applicable to the present situation. The preamble of the treaty recites that it is a "treaty of commerce and navigation." The phrase "commercial purposes," would naturally, therefore, be construed as of or pertaining to commerce. A judicial definition of the word "commerce," as used in the Constitution, which is changeable only by amendment to the organic law, cannot be said to be narrow or illiberal when applied to a treaty which is subject to repeal by either party or modification by joint agreement. The view of this court in these cases was not based upon any particular use of the word "commerce" in the Constitution or on legislative history, but, as was stated in *Kidd v. Pearson, supra,* it was the understanding which the court found to be conveyed to the common mind by the word as "clearly expressed in economic and political literature."

Appellants do not make the direct contention that the word "commercial" includes agriculture. They call attention, however, to that portion of Article I which gives to the subjects of the two nations the right "to do anything incident to or necessary for trade," and they seek by definitions of the word "trade" to include agriculture. There might be some plausibility to the contention were it not for the fact that the preceding portion of the article treats specifically with the matter of leases. If it had been the intention of the parties to permit leasing by the clause relating to the doing of things necessary for trade, then there would have been no occasion or necessity for an express provision in regard to leases which it will be noted is restrictive. Reading the phrase "commercial purposes" and the clause relating to the doing of things incidental to trade together, it must be concluded that the word "trade" refers to commerce, and commerce, as we have already shown, does not include agriculture. In any event, the legislative history of this treaty, to which we shall hereinafter refer, shows quite conclusively that it was understood by both parties that the treaty did not cover the leasing of realty for purposes of agriculture by subjects of either.

The application of the doctrine announced in these cases is also sought to be avoided in the bill by the allegation that the appellant Nakatsuka, in addition to being a farmer, is also a dealer in farm products which he sells at wholesale and retail, and

that he intends to sell the products to be raised on this land in the course of such business. We are unable to see how the fact that Nakatsuka may be engaged in an occupation which comes within the treaty could affect his rights to carry on another business not protected by that instrument. Sale is a necessary incident to agriculture and manufacture; yet it has been held that this fact does not make the manufacturer a farmer or a trader. It was said in *Kidd v. Pearson,* 128 U. S. 1-21:

"If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, fisheries, mining—in short, every branch of human industry."

In *Diamond Glue Co. v. U. S. Glue Co.,* 187 U. S. 611, 616, it was said that the imposition of a tax and certain other requirements upon a manufacturing corporation which shipped its products in interstate commerce did not burden that commerce. This contention was stated as follows:

"The superintendence and manufacture had to come before sale. The small requirements of this act before allowing plaintiff to do business in the state, if good as to the business taken by itself, are not made bad by the presence in the contract of an ulterior term which the plaintiff might or did intend to carry out by transporting the products of the business elsewhere."

Under these authorities the fact that Nakatsuka sells his product is immaterial. This being so, we fail to see how the fact that as a trader, he at the same time sells the products of another in a commercial sense, changes the situation. Suppose that it had been alleged that Nakatsuka, in addition to being a farmer, was also a dealer in automobiles. We apprehend that appellants would not contend that for that reason his rights as a farmer under the treaty would be any greater than those of his countrymen whose status was purely agricultural. We have already shown that the sale of farm products is merely a necessary incident to trade and commerce, and not a part thereof. Since that sale is the only connecting link between his activities as a trader and as a farmer, its rejection as a part of trade and commerce makes the situation the same as it would be in the case which we have supposed.

Any other conclusion would, in its practical effect, make the treaty extend to all forms of realty proposed to be used for purposes of profit. For instance, if the effect of the law may thus be evaded, then, by the same logic any dealer could appoint a farmer as his agent for the purpose of raising these products for the same alleged commercial purposes, with a consequent result that the treaty would permit leases for all agricultural purposes.

An elaborate argument is made by appellants in support of the contention that the treaty prohibits

any act which works any discrimination against the Japanese as compared with other races. No portion of the treaty is cited which is susceptible of such a construction, the entire argument being based upon the rule of liberality which it is said ought to obtain in the construction of treaties. Aside from the treaty itself, there is a sufficient and cognate reason for the instant rejection of this argument. In the case of *Sullivan v. Kidd,* 254 U. S. 433, this court said:

"While the question of the construction of treaties is judicial in its nature, and courts, when called upon to act, should be careful to see that international obligations are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the executive department of the government, charged with the supervision of our foreign relations, should be given much weight."

After which the court proceeded to quote from an unpublished letter of the Secretary of State construing the particular treaty there before the court.

This treaty has been the subject of diplomatic negotiations between the State Department and Japan, and the State Department has already announced a construction inconsistent with that contended for by appellants. This correspondence will be found in a printed document in the Library of Congress, entitled: "Resume of the Controversy Between Japan and the United States Arising Out of the California Question, Class JV 6888, Book C2J4." Upon the fly leaf of this book is a printed sticker of the De-

partment of State, Bureau of Rolls and Libraries, with the following notation:

"This is said to be an official Japanese publication printed at Tokio."

We have been informed by the Attorney General of California that this correspondence also appears at pages 632 to 652 of "Papers Relating to Foreign Relations of the United States, 1913, Department of State, United States of America." We have not been able to verify this latter citation, however. We assume that there is no doubt concerning the authenticity of this correspondence, since it was referred to by the District Court and its correctness is not attacked in the briefs of appellant.

From this correspondence it appears that upon the passage of the California Alien Land Act of 1913, which provided restrictions upon alien ownership not dissimilar to those imposed in the act in the case at bar, the Japanese Government officially protested against the act upon the ground that in some of its features it violated the treaty. In passing, it is worthy of comment, however that it apparently acquiesced in the proposition that agricultural leases did not come within the terms of the treaty, although the act restricted agricultural leases to terms of three years. For instance, upon page 2 of this document the statement appears:

"It is true that under the law, Japanese are granted the right to lease agricultural lands for a short term—*a right which is not expressly secured*

by the Treaty—but they are denied the right to acquire, possess and inherit land, whereas that right is freely granted to other aliens." (Italics ours.)

Upon page 8 there is an account of an audience had between the President of the United States and the Japanese Ambassador. The Japanese Ambassador read a memorandum relating to the California act and the treaty, and in reply the President stated:

"That if on further study the law should be found to be in conflict with the treaty provisions, the administration would be prepared to seek a judicial remedy, and that, even in case a suit should not be instituted, means would be sought to compensate Japanese for any loss which they might have actually sustained."

We regard this statement as quite pertinent with respect to the executive construction of this treaty, since, in so far as we are informed, the Government never made any effort to seek a judicial remedy in behalf of the Japanese affected by the California act or to compensate them, although it appears that the President had undertaken to do this if he should become convinced that the act was in conflict with the treaty. The correspondence set forth in this document is particularly material. Included therein is a letter from Viscount Chinda to Secretary of State Bryan, written under date of May 9, 1913. In this letter the Ambassador protested against the California act upon various grounds not here involved, but at the same time he did not controvert the proposition that agricultural leases are not protected by

the treaty. This appears from his statement upon page 3 of this document, where he said:

"Moreover, in its relation to *house property*, the legislation appears to be, in a much wider sense, repugnant to the provisions of the first clause of the same Article, by which Japanese subjects are granted, in reciprocity, and upon the same terms as American citizens, the right to own houses, manufactories, warehouses and shops."

Letter No. 6 consists of the memorandum prepared by the legal advisor to the Japanese Ambassador under date of July 3, 1913. This memorandum makes various objections to the California act but does not deny the proposition that agricultural leases are not included. The view of the State Department is made conclusive by letter No. 7, which appears upon page 15 of the appendix, and is a letter of Secretary of State Bryan to Viscount Chinda, written under date of July 16, 1913. Without reviewing this letter in detail it may be said that the conclusion which the State Department reached was that the California act did not violate the treaty. Mr. Bryan, in referring to the particular provisions of Article 1 which are relied on by these plaintiffs, said:

"This treaty was based upon a draft presented by the Imperial Government. In Article I of this draft there is found the following clause:

" '3. They (the citizens or subjects of the contracting parties) shall be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for residential, commercial, industrial, manufacturing and other lawful purposes.'

"It will be observed that in this clause, which was intended to deal with the subject of real property, there is no reference to the ownership of land. The reason of this omission is understood to be that the Imperial Government desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation.

"In the treaty as signed the rights of the citizens and subjects of the contracting parties with reference to real property were specifically dealt with (Art. I) in the stipulation that they should have liberty 'to own or lease and occupy houses, manufactories, warehouses and shops,' and 'to lease land for residential and commercial purposes.' It thus appears that the reciprocal right to lease land was confined to 'residential and commercial purposes' and that the phrases 'industrial' and 'other lawful purposes,' which would have included the leasing of agricultural lands were omitted.

"The question of the ownership of land was, in pursuance of the desire of the Japanese Government, dealt with by an exchange of notes in which it was acknowledged and agreed that this question should be regulated in each country by the local law and that the law applicable in the United States in this regard was that of the respective States. This clearly appears from the note of Baron Uchida to Mr. Knox of February 21, 1911, in which, in reply to an inquiry of the latter on the subject Baron Uchida said:

"'In return for the rights of land ownership which are granted Japanese by the laws of the various states of the United States (of which, I may observe, there are now about thirty) the Imperial Government will by liberal interpretation of the law be prepared to grant land ownership to *American citizens from all the States, reserving for the future, however, the right of maintaining the condition of reciprocity with respect to the separate States.*' (Italics Mr. Bryan's.)

"In quoting the foregoing passage I have italicized the last clause for the purpose of calling special attention to the fact that the contracting parties distinctly understood that, in conformity with the express declaration of the Imperial Japanese Ambassador, the right was reserved to maintain as to land ownership the condition of reciprocity in the sense that citizens of the United States, coming from States in which Japanese might not be permitted to own land, were to be excluded from the reciprocal privilege in Japan.

"From what has been pointed out it appears to result, first, that the California statute, in extending to aliens not eligible to citizenship of the United States the right to lease lands in that State for agricultural purposes for a term not exceeding three years, may be held to go beyond the measure of privilege established in the treaty *which does not grant the right to lease agricultural lands at all;* and, secondly, that, so far as the statute may abridge the right of such aliens to own lands within the States, the right has been reserved by the Imperial Government to act upon the principle of exact reciprocity with respect to citizens of the individual States. In a word, the measure of privilege and the measure of satisfaction for its denial were perfectly understood and accepted."

The court will therefore observe that it was the view of Mr. Bryan that the Act of 1913 was not in conflict with the treaty. Attached to the letter of Mr. Bryan is a document apparently prepared by the legal adviser to the State Department, which answers the points raised by the legal adviser to the Japanese Ambassador, and in which the conclusion is reached that the California act does not violate the treaty. It is interesting to observe that this

document, although prepared immediately after the enactment of the treaty, also meets the objection raised by appellants with respect to alleged discrimination. The California act permitted aliens eligible to citizenship to hold real property, but denied this privilege to those ineligible except where conferred by express treaty. The Japanese Government raised exactly the same claim with respect to discrimination as have appellants in the case at bar. The legal adviser of the State Department simply answered this with the statement that "the statute contains no discrimination against Japanese as such, but applies equally to all aliens not eligible to citizenship."

We desire particularly to emphasize the fact pointed out by Mr. Bryan in his letter of July 16, 1913, that the treaty as originally drafted by the Japanese Government included the right to lease land for "industrial, manufacturing and other lawful purposes," but that this clause was thereafter withdrawn for the reason that the Japanese Government "desired to avoid treaty engagements concerning the ownership of land by foreigners and to regulate the matter wholly by domestic legislation."

Attention is likewise directed to the further fact that when the California Act of 1913 was pending in the legislature of California, Secretary of State Bryan made a trip to California to prevent its enactment. (Congressional Record, 66th Cong. 3d Sess., Vol. 60, p. 4148.) There is no record, how-

ever, that it was ever claimed by the State Department that the contemplated act violated the treaty.

Since it thus appears that Mr. Bryan was opposed in principle to legislation of this character, his view as to the meaning and scope of the treaty is for that reason entitled to the greater consideration. It is submitted that there is nothing in the treaty which prevents a state from prohibiting the leasing of realty to Japanese aliens. The question of whether or not there are other features of the act which might come in conflict with the treaty is not before the court, because it will be presumed that whenever such a conflict arises, the state authorities of Washington will give due and proper regard to the terms of the treaty.

The judgment of the trial court was correct, and should be affirmed.

Respectfully submitted,

L. L. THOMPSON,
Attorney General, State of Washington,
Solicitor for Appellee.

E. W. ANDERSON,
of Counsel.

APPENDIX.

CHAPTER 50.

[H. B. 79.]

ALIENS.

AN ACT relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. In this act, unless the context otherwise requires,

(a) "Alien" does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;

(b) "Land" does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is accorded the use of land by a treaty between the United States and the country whereof he is a citizen;

(c) "Land" also includes any share or interest in a corporation or other organized group of persons deemed

an alien in this act which has title to land either heretofore or hereafter acquired;

(d) To "own" means to have the legal or equitable title to or the right to a v benefit of;

(e) "Title" includes every kind of legal or equitable title;

(f) Ownership of or title to land acquired by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts, or acquired by a female citizen afterwards expatriated by marriage to an alien, is excluded;

(g) "Inheritance" includes devise;

(h) "Mortgage" includes every kind of lien upon land;

(i) A mortgage of land under which an alien is entitled before default to any control, possession, use or enjoyment of the land, is an absolute conveyance; and

(j) "Person" includes an individual, partnership, corporation or any other organized group of persons.

SEC. 2. An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state.

SEC. 3. An alien is not qualified to be trustee under a will, executor, administrator or guardian, if any part of the estate is land: *Provided,* An alien now lawfully acting in any such capacity may continue for not more than two years.

SEC. 4. If hereafter an alien acquire land by inheritance or in good faith either under mortgage or in the

ordinary course of justice in the collection of debts and, remaining an alien, hold the same for more than twelve years from the date title was so acquired or control or possession taken, the land shall be forfeited to the state.

SEC. 5. If an alien, claiming or holding under a mortgage, has control, possession, use or enjoyment of the mortgaged land, the obligation secured by the mortgage shall be deemed matured and the mortgage shall be foreclosed; and if the land be not sold under foreclosure within three years after the alien has obtained control, possession, use or enjoyment, the mortgage and the obligation thereby secured shall be forfeited to the state and shall be foreclosed for the use of the state.

SEC. 6. Unless an alien who has declared his intention to become a citizen of the United States be admitted to citizenship within seven years after his declaration was made, it shall be presumed that he declared his intention in bad faith.

SEC. 7. Whoever

(a) Knowingly transfers or conveys land or title to land to an alien; or

(b) Knowingly takes land or title to land in trust for an alien; or

(c) Holding in trust for an alien land or title to land, either heretofore or hereafter acquired, fails for thirty days after acquiring knowledge or notice that he holds in trust for an alien to disclose the fact to the attorney general or the prosecuting attorney of the county where the land is situated; or

(d) Being an alien and having title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the

county where the land is situated the nature and extent of his interest in and title to the land; or

(e) Being an officer or agent of a corporation or other organized group of persons which has title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of the interest of persons not citizens of the United States in the corporation or other organized group of persons; or

(f) Being an officer or agent of a corporation or other organized group of persons which holds in trust for an alien title to land or control or possession of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of the alien's interest in and title to the land; or

(g) Wilfully counsels, aids or abets another in violating or evading this act,

Is guilty of a gross misdemeanor.

SEC. 8. It shall be the duty of the attorney general and of the prosecuting attorneys of the several counties to enforce this act, and of the attorney general to direct and control its enforcement.

SEC. 9. Property forfeited to the state by this act shall inure to the permanent common school fund and be managed and disposed of accordingly.

SEC. 10. This act shall not impair any title or right heretofore or hereafter acquired from or derived through an alien in good faith and for value by a person not under an alien's disability.

SEC. 11. If any section or provision of this act shall be adjudged to be invalid or unconstitutional, such ad-

judication shall not affect the validity of the act as a whole or any section, provision, or part thereof not adjudged invalid or unconstitutional.

SEC. 12. Sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington are hereby repealed.

Passed the House February 25, 1921.

Passed the Senate March 2, 1921.

Approved by the Governor March 8, 1921.

[No. 17285. Department One. October 14, 1922.]

THE STATE OF WASHINGTON, *Appellant*, v. E. J. O'CONNELL *et al*, *Respondents*.[1]

Aliens (3)—Real Property—Constitutional and Statutory Restrictions.

Conversion (1)—Equitable Conversion—Real Property as Personalty—Statutes.

Treaties (3)—Operation as to Laws Repugnant to Treaty Provision.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 23, 1922, dismissing an action to escheat alien lands, upon sustaining a demurrer to the complaint. Reversed.

Malcolm Douglas, Arthur Schramm, Jr., and *Bert C. Ross*, for appellant.

Pierce Lonergan, for respondents.

The Attorney General, amicus curiae.

BRIDGES, J.—This case concerns the anti-alien land law of the state of Washington, being ch. 50 of the Laws of 1921, p. 156. It will be necessary, even at the risk of making this opinion of undue length, to set out in considerable detail the constitutional and statutory pro-

visions governing the question, and also the declaration of trust hereinafter mentioned.

Section 33 of our constitution, so far as it affects this case, reads as follows:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void. . . ."

Section 2, ch. 50, p. 157, Laws of 1921 (Rem. Comp. Stat., § ——) reads as follows:

"An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation of the constitution or of this act shall thereby be forfeited to and become the property of the state."

By this act, an "alien" is defined as one who has not declared his intention to become a citizen of the United States. It defines "land" as not including lands containing valuable deposits of minerals, etc., "but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof. . ." The word "own" is defined to mean "the legal or equitable title to or the right to any benefit of" land; and the word "title" includes "every kind of legal or equitable title."

After the passage and going into effect of this statute, certain land was deeded to the respondents, J. D. O'Connell and Pierce Lonergan, as trustees, and they

made, executed, acknowledged and caused to be recorded a declaration of trust, which shows that they hold the land in question (which is residential and non-mineral property in the county of King, in the state of Washington) for the benefit of the *cestuis que trust* upon the following terms:

"1. In trust to convert the same into money and distribute the net proceeds thereof among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the receipt certificates issued by the Trustees as hereinafter provided; it being however expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion or distribution, except that the same shall not be postponed beyond the end of twenty years from July 1, 1921. During such postponement, and until such conversion, the interests of the *cestui que trusts* shall be considered for purposes of transmission and otherwise as personal property.

"2. In trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having for such purposes and for all purposes of sale, lease, mortgage, exchange, improvement and development, and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as they would have if they were themselves the sole and absolute beneficial owners thereof in fee simple.

"3. In trust to collect and receive all rents and income from the property, the Trustees in this connection having full authority from time to time to use any funds on hand, whether received as capital or income, for purposes of any repair, improvement, protection or development, of the property held hereunder, or the acquisition of other property as the Trustees may determine to be wise and expedient, for the protection and development of the trust property as a whole pending its conversion and distribution. The determination of the

Trustees made in good faith as to all questions as between 'capital' and 'income' shall be final.

"4. This trust is declared in favor and for the benefit of E. J. O'Connell and D. P. O'Connell, a minor, each having a one-half beneficial interest as shown by certificates of interest which shall be issued to each of them by the undersigned Trustees; which certificates and all others which may be hereafter issued in exchange or substitution therefor shall be deemed parts hereof and conclusive evidence of the ownership of respective interests in this Trust; and the Trustees shall from time to time on request (on surrender of the old) issue such new certificates as may be proper or necessary to evidence any new or subdivided interests. . . .

"6. The Trustees may employ all such agents and attorneys as they may think proper and find expedient, and prescribe their powers and duties.

"7. The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least annually, render account of the Trust to any beneficiary requesting the same, but no Trustee serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability except for the results of his own gross negligence or bad faith.

. . .

"9. The Trustees shall be entitled to receive reasonable compensation for service not exceeding a total of one per cent, reckoned upon the gross income received by them as such, unless at any time a majority in interests of the cestui que trusts consent in writing to some larger compensation for any past service; but in no event are they to receive less than $50.00 per year each. The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and shall be entitled at all times to the advice of counsel; and traveling expenses shall be considered proper expenses. . . .

"11. The terms and provisions of this Trust may be modified at any time or times by instruments in writing, signed, sealed and acknowledged by the then Trustee,

assented to in writing by the cestuis que trusts and attached to the original of this instrument. . . .

"14. At the end of twenty years from and after July 1, 1921, (unless this trust shall heretofore have been otherwise lawfully terminated) all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons then entitled."

The state of Washington instituted suit for the purpose of escheating to itself an undivided one-half interest in the property. The complaint alleged the execution and set out the terms of the trust declaration, and further alleged that all of the transactions took place subsequently to the going into effect of the above mentioned 1921 law, and that E. J. O'Connell, one of the *cestuis que trust* mentioned in the trust declaration, was and is an alien, and has not declared his intention to become a citizen of the United States, and was and is a subject of the British Empire. The trial court sustained a demurrer to the complaint, and the state has appealed from a judgment dismissing the action.

The sole question before us is: does the trust arrangement above set out violate our anti-alien land act.

It has become the settled law of this country that, in the absence of a treaty to the contrary, a state may lawfully prohibit aliens from owning or acquiring any lands, or any interest therein, within its borders. *Orr v. Hodgson*, 4 Wheat. (U. S.) 452; *Hauenstein v. Lynham*, 100 U. S. 483; *United States v. Repentigny*, 72 U. S. 211; *DeVaughn v. Hutchinson*, 165 U. S. 566; *Blythe v. Hinckley*, 180 U. S. 333; *Clarke v. Clarke*, 178 U. S. 186; *Jones v. Jones*, 234 U. S. 615; *Sullivan v. Kidd*, 254 U. S. 433.

Judge Cushman, in the recent case of *Terrace v. Thompson, Attorney General*, 274 Fed. 841, discussing

another feature of this same statute, forcefully wrote concerning its purposes as follows:

"If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a Tower of Babel, from which the tenants in possession might, when the shock of war came, bow themselves out, because they were not bound as citizens to defend the house in which they lodged."

Our constitution provides that "the ownership of lands by aliens . . . is prohibited in this state . ." It was entirely within the province of the state legislature to determine by legislation what are lands, and when one becomes an owner thereof, within the meaning of the constitutional provision. In so doing, it has declared that "land" "does not include lands containing valuable mineral deposits," etc., "but does include every other kind of land and every interest therein and the right to the control, possession, use, enjoyment, rents, issues or profits thereof . . ." and it has said that ownership includes "the right to any benefit of" lands.

For the purposes of this discussion, it may be conceded that, under the declaration of trust involved here, the alien does not have the right to the control, possession and use of the lands involved, and that he does not own the legal or equitable title; but that he owns the "right to the benefit of" the land, and has the "right to" the "enjoyment, rents, issues and profits thereof," there cannot be any doubt. These rights are by the legislature defined to be land or an interest in or benefit of land, and they are most surely in violation, not only of the spirit of our legislative act, but the very words thereof. To

hold that an alien may lawfully place the title to lands in this state in the name of someone else and yet be entitled to the income therefrom, would be to destroy the very object and purpose of the law, and make it possible, at very little inconvenience and cost, for the alien to circumvent it. For if one be entitled to the rents and issues of land, and also the sales price in which would be included any increase of value, he would have all the real substance of actual ownership, and would, at most, be deprived only of the actual legal title, personal possession and personal control. These might, with reasonable safety, be entrusted to someone else. If thereby he runs the risk of the honesty of the trustees, he finds the courts of the country open to him to protect him against any of their dishonest acts.

The respondents very earnestly insist that there is nothing in the trust declaration which says that the alien is to receive any of the rents, issues or profits. It may be conceded that there is not to be found within the instrument any express words which would bind the trustees to pay the rents and income to the alien, either periodically or at the termination of the trust. But it is expressly provided that the trustees shall "collect and receive all rents and income from the property . . ." and they are authorized to use any money in their hands for repair, upkeep and expenses. But what is to become of the remainder of the income? Certainly the trustees are not personally entitled to those funds. Their compensation is fixed by another section of the trust declaration. They must, in good conscience, retain the unexpended portions of the rents, issues and profits for the benefit of the *cestuis que trust*. It is immaterial whether they must account for those funds and pay them annually or when the land is finally sold and the trust ended. The

moneys arising from rents and income cannot lose their character as such simply by delay in the time of their payment. If they are rents and income when paid monthly, they are likewise rents and income when paid at any future period. If this instrument should be held valid and the trustees should refuse to account for the rents and profits found in their hands, the *cestuis que trust* would have no hesitancy in appealing to the courts of the country for the enforcement of their rights, and would doubtless be successfully heard. We have no doubt, therefore, that the rents, issues and profits which, by the statute, are declared to be land or an interest in land, and which the trustees are authorized and expected to collect from time to time, are held for the *cestuis que trust* and must—if not annually—ultimately be paid to them, less such sums as may have been properly expended under the terms of the trust declaration.

The respondents contend that the doctrine of equitable conversion must be controlling of this case. That question has been elaborately and learnedly briefed and argued by both sides, and by the *Attorney General* in an *amicus curiae* brief. While the doctrine may have some bearing in a general way on the question before us, yet we are convinced that a too elaborate discussion of it would only serve to confuse the real point in issue, which is, a proper construction of the anti-alien land law, and its application to the facts of this case. In vol. 6, R. C. L. p. 1065, it is said:

"Equitable conversion may be defined as that constructive alteration in the nature of property by which in equity real estate is considered for certain purposes as personalty and transmissible and descendible as such, or personal estate as realty. It is an outgrowth of application of the old maxim that equity regards that as done which ought to be done, and therefore, to the opera-

tion of the doctrine it is essential that the property to be so treated should be subject to a trust or a clear and imperative direction for conversion."

And on the following page it is said:

"As the phrase itself implies, equitable conversion is a mere fiction of equity, the basic principle of which is that a court of equity, regarding the substance and not the mere form and circumstances of agreements and other instruments, considers things directed or agreed to be done as having been actually performed. where nothing has intervened which ought to prevent a performance."

A typical case is that of *Benham v. Taylor,* 5 How. (46 U. S.) 233. This case came from a state where there was a statute prohibiting aliens from owning lands. William F. Taylor's will provided that as soon as possible after his death all of his real estate and personal property should be, by his executors, converted into money, and after making certain bequests of money to various persons, he gave the remainder of his property to a brother and sister, who were aliens. It was contended that the will was void in so far as the aliens were concerned, because, under the statute, it was unlawful for them to take or hold real estate or any interest therein. The court, in substance, held that, in order to avoid an escheat and carry out the wishes of the testator, a court of equity, if necessary, would consider land as money, where a testator, who was a trustee, has directed the land to be sold, and the will directs the proceeds to be given to the *cestuis que trust.*

How can that doctrine be of avail to the respondents? Equitable conversion is not a rule of law, but is a fiction which will be enforced only when necessary to accomplish manifest justice, and never to circumvent the public policy of the state as expressed in statutory form. The

legislature is not bound by this legal fiction. It may repudiate it in whole or in part. It has declared that the rents, issues and profits are to be considered as land, or, at least, a beneficial interest in land, and thus there is no room left for the application of the doctrine of equitable conversion, even though it might be applied in a case of this character under a statute different from ours. The question here is not one of the application of an equitable fiction, but one of the construction of an act of the legislature. If the trust declaration comes within the letter or spirit of our statute, then it is void, notwithstanding the doctrine of equitable conversion.

But there is another reason why that doctrine is inapplicable to the facts of this case as pleaded. Mr. Pomeroy, in the 3rd volume of his work on Equity Jurisprudence § 1160 (4th ed.), speaking of this doctrine says:

"The rule is therefore firmly settled, that in order to work a conversion *while the property is yet actually unchanged* in form, there must be a clear and imperative direction in the will, deed, or settlement, or a clear imperative agreement in the contract, to convert the property,—that is, to sell the land for money, or to lay out the money in the purchase of land. If the act of converting —that is, the act itself of selling the land or of laying out the money in land—is left to the option, discretion, or choice of the trustees or other parties, then no equitable conversion will take place, because no *duty* to make the change rests upon them."

All of the authorities seem to uphold this declaration of Mr. Pomeroy. In the declaration of trust involved here, there is no imperative agreement to convey the property. It is true, section one provides that the property shall be converted into money and distributed at some time within twenty years, but section eleven of the declaration practically nullifies this provision of the agreement, for it provides that,

"The terms and provisions of this trust may be modified at any time or times by instruments in writing, signed, sealed and acknowledged by the then trustees, assented to in writing by the cestuis que trust and attached to the original instrument."

Under this provision, by agreement of all the parties concerned, any and all of the terms of the declaration of trust may be modified in such a way as that the alien might become the absolute owner of the property involved, and have the actual control and possession thereof. But the view we have already taken of this question makes it unnecessary to pursue this particular phase of the argument farther.

The respondents forcefully argue that the interpretation of the statute which we have given would be in violation of the treaty of 1899, between Great Britain and the United States, which instrument is found in vol. 31, U. S. Stats. at Large, p. 1939. Article one of the treaty is with reference to real estate, and provides that "where, on the death of any person holding real property (or property not personal), within the territories of one of the Contracting Parties, such real property would, by the laws of the land, pass to a citizen or subject of the other were he not disqualified by the laws of the country where such real property is situated," such citizen or subject shall be allowed a designated time within which to dispose of such property. Article two, being the one relied on by the respondents, is as follows:

"The citizens or subjects of each of the Contracting Parties shall have the power to dispose of their personal property within the territories of the other by testament, donation or otherwise; and their heirs, legatees and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property and may

take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases."

It will be noticed that Article two of the treaty is with reference to personal property—that is, property which may not fairly be considered real property. The respondents argue, however, that the state may not, by legislation, convert what is commonly and universally recognized as personal property into real estate or an interest therein and thereby cause an escheat, and that when the legislature undertook to declare rents, issues and profits to be "land" or beneficial interests in land, it violated the treaty provision.

It may be admitted that the legislature may not, by mere arbitrary definition, convert that which has always been known as personal property into real property, because such legislation would be in violation of the spirit of the treaty. But there are certain things which, in and by themselves, would be considered personal property; yet, because of their close and intimate connection with the land, may rightly be declared to be parts of, or interests in, the land. Such are rents, issues and profits derived from land, where ownership or beneficial interest therein is prohibited as by the legislation under consideration.

We are convinced that the transaction we have been considering violates our anti-alien land law, and the court erred in sustaining the demurrer to the complaint and in dismissing the action. The judgment is reversed.

PARKER, C. J., FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

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Supreme Court of the United States

October Term, 1922

No. 302

FRANK TERRACE AND ELIZABETH TERRACE, HIS WIFE, AND N. NAKATSUKA,
APPELLANTS

— VS —

LINDSAY L. THOMPSON, ATTORNEY GENERAL OF THE STATE OF WASHINGTON,
APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

Reply Brief of Appellants*

The decree appealed from should be reversed because the statute of Washington, the enforcement of which was sought to be enjoined, is invalid:

(A) Because it conflicts with the treaty between the United States and Japan.

* Italics are the writers'.

(B) Because it is in conflict with the Fourteenth Amendment to the Constitution of the United States.

A

THE STATUTE IS IN CONFLICT WITH THE TREATY.

1. It denies to *alien Japanese residents* of the State of Washington, on account of their *race, color and place of nativity*, treatment equal to that accorded other alien residents of Washington of different race and color because of such race and color.

2. It makes an invidious discrimination against alien Japanese residents of Washington on account of their *race, color and place of nativity* not made against *other alien residents* of Washington of *different race and color.*

3. It creates a fictitious status of "*statutory alienage*" which, because of their *race, color and place of nativity, automatically* and *compulsorily attaches to alien Japanese residents* of Washington, rendering criminal *their* purchase, control or lease of land, but which does not attach, with its attendant penalties, to alien residents of Washington of *different race and color* who purchase con-

trol or lease lands unless they fail to exercise their option to avoid such "statutory alienage."

The Japanese, because of race, color and place of nativity, are automatically and compulsorily assigned to the lower and unenviable status of "statutory alienage," while aliens of other races and colors need only occupy such status at their election.

The substance of the statute, so far as it affects this case, is as follows:

1. " 'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States." Sec. 1 (a).

2. "Does include all other aliens." Sec. 1 (a).

3. " 'Land' includes agricultural land and the right to the control, possession, use, enjoyment, rents, issues and profits thereof." Sec. 1 (b.)

4. "An alien shall not own land or take or hold title thereto." Sec. 2.

5. "An lien is not qualified to be trustee under a will, executor, administrator or guardian if any part of the estate is land." Sec. 3.

6. Whoever knowingly conveys land to an alien is guilty of a gross misdemeanor. Whoever

aids or abets another in violating the act is guilty of a gross misdemeanor. The person who conveys land to an alien and the alien who purchases are both guilty of a gross misdemeanor. Sec. 7, (a, g.)

7. An alien, having title to land or control, possession, use or enjoyment of land, who refuses to disclose to the Attorney General the nature of his title or interest in land, is guilty of a gross misdemeanor. Sec. 7 (d.)

It is clear from both the excluding and including definition of the word "alien" in the statute that Japanese born in Japan and resident in the State of Washington are automatically and inescapably branded by reason of their *race, color and place of nativity*, with the stigma of "statutory aliens" and in case they purchase, control or lease land, are under the statute guilty of a gross misdemeanor.

It is equally clear from the same definition of "alien" that aliens of other races and color resident in Washington were by the statute, which was approved March 8, 1921, but did not take effect until June 13, 1921, granted the option to entirely avoid the brand of statutory alienage by filing a declaration of intention before the statute

became effective or thereafter to erase such brand by a similar declaration.

That the statute does not in express language state that it is intended to so discriminate against Japanese because of their race, color and place of nativity, is immaterial. The statute would have possessed one less vice had its intent been so expressly declared. It would have been more honest. It would have been more courageous, for it would do away with the pretense that the standard to be complied with to avoid the stigma of statutory alienage is the same for all, although it is common knowledge that it was prescribed, not so that it might be complied with by Japanese, but so that the Japanese could not comply.

It is not, however, the form of the statute which determines whether the standard prescribed is one which is lawful or only a cloak to conceal one which is unlawful. If the statute would have been invalid had it in express language stated that its object was to allow resident aliens to own, control and lease land in the State of Washington, provided they were not Japanese born in Japan, then the statute in the form in which it was enacted is equally invalid because such result is not only the possible effect of the statute, but is the necessary

and inevitable effect of the statute, and such effect was intended as clearly as though it had been expressly so stated.

1. The provisions of the treaty which require consideration and which are quoted particularly to show the standards of treatment agreed upon, are the following: (U. S. Stats. at Large, Vol. 37, pp. 1504-1509):

"The President of the United States of America and his Majesty, the Emperor of Japan, being desirous *to strengthen the relations of amity and good understanding which happily exist between the two nations*, and believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of *this most desirable result*, have resolved to conclude a treaty of commerce and navigation *for that purpose*."

"ARTICLE I.

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes and,

generally, to do anything incident to or necessary for trade, upon the same terms *as native citizens* or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxation other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive in the territories of the other the most constant protection and security for their persons and property and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

"ARTICLE IV.

"There shall be between the territories of the two high contracting parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the contracting parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other, which are or may be opened to foreign commerce: subject, always, to the laws of the country to which they thus come."

"ARTICLE VI.

"The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other, exemption from all transit duties and a perfect equality of treatment with native citizens or subjects in all that relates to warehousing, bounties, facilities and drawbacks."

"ARTICLE XI.

"No duties of tonnage, harbor, pilotages, lighthouse, quarantine or other similar or corresponding duties of whatever denomination, levied in the name of or for the profit of government, public functionaries, private individuals, corporations or establishments of any kind, shall be imposed in the ports of the territories of either country upon the vessels of the other, which shall not equally under the same conditions be imposed on national vessels in general or on vessels of the most favored nation. Such equality of treatment shall apply reciprocally to the respective vessels from whatever place they may arrive and whatever may be their destination."

"ARTICLE XII.

"Vessels charged with performance of regular scheduled postal service of one of the high contracting parties, whether belonging to the state

or subsidized by it for the purpose, shall enjoy in the ports of the territories of the other the same facilities, privileges and immunities as are granted to like vessels of the most favored nation."

"ARTICLE XIII.

"The coasting trade of the high contracting parties is excepted from the provisions of the present treaty and shall be regulated according to the laws of the United States and Japan respectively. It is, however, understood that the citizens or subjects of either contracting party shall enjoy in this respect most favored nation treatment in the territories of the other."

"ARTICLE XIV.

"Except as otherwise expressly provided in this treaty, the high contracting parties agree that in all that concerns commerce and navigation, any privilege, favor or immunity which either contracting party has actually granted or may hereafter grant to the citizens or subjects of any other state, shall be extended to the citizens or subjects of the other contracting party gratuitously if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional."

"ARTICLE XV.

"The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other the same protection as native citizens or subjects in regard to patents, trademarks and designs, upon fulfillment of the formalities prescribed by law."

The treaty established two standards of treatment for the citizens or subjects of the respective countries as to all matters covered by the treaty.

1. The standard applicable to native citizens or subjects;

2. That applicable to citizens or subjects of the most favored nation.

Even as to the coasting trade which by Article XIII was excepted from the provisions of the treaty, and was to be regulated according to the laws of the respective countries, the following declaration was made:

"It is, however, understood that the citizens or subjects of either contracting party shall enjoy in this respect *most favored nation treatment* in the territories of the other."

Nowhere in the treaty is there any expression indicating that either party to the treaty contemplated the possibility of the citizens or subjects of either being singled out for invidious discrimination as compared with the citizens or subjects of any other nation, whether the particular matter referred to was included in or excepted from the provisions of the treaty. It is impossible, therefore, to suppose that in a treaty which the high contracting parties had resolved to conclude because they were desirous of strengthening the relations of amity and good understanding which happily existed between them, there was concealed the mental reservation on the part of either government that invidious treatment by either of the citizens or subjects of the other, or by a state constituting a part of the territory of either country, would be permissible under the treaty in respect to any matter not dealt with therein.

"Is it necessary, in an enlightened age, to say that mental reservations cannot be admitted in treaties? This is manifest, since by the very nature of the treaty the parties are bound to express themselves in such manner that they may mutually understand each other. There is scarcely an individual now to be found who would not be ashamed of building upon a mental reservation. What can be the use of such an artifice, unless to lull the op-

posite party into a false security under the vain appearance of a contract?"

Vattel, Law of Nations, Book 2, Sec. 275.

No one will believe that either of the high contracting parties intended any such mental reservation.

It is not necessary that the treaty should in express language forbid the invidious discrimination complained of. Such discrimination is as absolutely forbidden by implication as it would have been had the prohibition been explicitly set forth. If the discrimination complained of is one which is forbidden by the spirit of the treaty the probihition is as absolute as if the discrimination were forbidden by the letter of the treaty.

"It is a general principle of construction with respect to treaties, that they shall be liberally construed so as to carry out the apparent intention of the parties to secure *equality and reciprocity* between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning as understood in the Public Law of Nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended; and it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it,

and the other favorable to them, *the latter is to be preferred.*"

Geofroy v. Riggs, 133 U. S. 258, 271.

"We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention, being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides* and in a manner to carry out its manifest purpose. Taylor on International Law, Sec. 383. As treaties are solemn engagements, entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and to secure a lasting and perpetual peace, *but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity* so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of a jurisprudence."

Tucker v. Alexandroff, 183 U. S. 424, 427.

The treaty of 1911, in Article XVI, provided as follows:

"The present treaty shall, from the date it enters into operation, supersede the treaty of commerce and navigation dated the 22nd day of November, 1894, and from the same date the last named treaty shall cease to be binding."

The treaty of 1894 between the United States and Japan did not deal with the subject of schools to the same extent that the treaty of 1911 deals with the subject of land, and the provisions of the treaty of 1894 in respect to the two standards of treatment are not different, substantially, from those of the treaty of 1911.

In 1906 the State of California and the School District Board in San Francisco took certain action which the government of Japan claimed constituted an invidious discrimination against Japanese children resident in San Francisco, forbidden by the treaty of 1894. Mr. Root was then Secretary of State of the United States. Two suits were filed in the federal court in California, but were never tried upon the merits. On April 19, 1907, at the first meeting of the American Society of International Law, Mr. Root, then Secretary of State of the United States and President of the Society, delivered an address, in which he explained the controversy which had arisen in California in respect to Japanese children attending the public schools. In that address Mr. Root said (Addresses in International Subjects—Root, pp. 6, 11, 12, 13):

"The excitement has now subsided, so that it may be useful to consider what the question really

was, not because it is necessary for the purposes of that particular case, but because of its bearing upon cases which may arise in the future under the application of the treaty-making power of the United States to *other matters and in other parts of the national domain.*" * * *

"There was a very general misapprehension of what this treaty really undertook to do. It was assumed that in making and asserting the validity of the treaty of 1894 the United States was asserting the right to compel the state of California to admit Japanese children to its schools. No such question was involved. That treaty did not, by any possible construction, assert the authority of the United States to compel any state to maintain public schools or to extend the privileges of its public schools to Japanese children or to the children of any alien residents. The treaty did assert the right of the United States, by treaty, to assure to the citizens of a foreign nation residing in American territory equality of treatment with the citizens of other foreign nations, so that if any states chooses to extend privileges to alien residents as well as to citizen residents, the state will be forbidden by the obligation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made *and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries.* The effect of such a treaty, in respect of education, is not positive and compulsory; it is *negative and prohibitory.* It is not a requirement that the state shall furnish education; it is a prohibition *against*

discrimination when the state does choose to furnish education. It leaves every state free to have public schools or not, as it chooses, but it says to every state: 'If you provide a system of education *which includes alien children*, you *must not exclude these particular alien children.*' "

It is to be remembered that this address was made by Mr. Root when Secretary of State and President of the American Society of International Law, after Japan had made its protest to the United States against the action of California in discriminating between alien Japanese children and other alien children resident in California, and prior to the making of the treaty of 1911. The government of Japan, therefore, had the right to assume that the position taken by the Secretary of State of the United States upon the question of discrimination between alien Japanese residents and other alien residents was the position of the United States until the United States should advise the government of Japan that such was not the case.

The position of the United States in reference to such discriminations was not a new one. It was, in effect, the same as that which the United States had taken in order to protect the rights of American citizens in Turkey, in Mexico, and had announced it would take in Cuba if necessary.

In respect to the controversy with Turkey, Mr. Bayard, then Secretary of State, said that friendship and comity entitled the United States "to ask and expect that no race or class distinction shall be made as regards American citizens abroad."

Moore, International Law Digest, Vol. 3, page 130.

In reference to the Spanish law or regulation prohibiting the landing of foreign negroes in Cuba unless on condition of depositing $1,000, the Department of State of the United States said, that it was not aware that any such requirement had ever been demanded of an American citizen resorting to Cuba, and if a case should be brought to its notice it would remonstrate against it "as imposing a race discrimination not foreseen by the treaty or recognizable under the amended constitution."

Moore, International Law Digest, Vol. 4, page 109.

In the correspondence referred to in Moore's International Digest, Vol. 6, page 702, concerning the Mexican controversy, it appears that the position of the United States in its protest against the Mexican law which forbade citizens of states bordering on Mexico to acquire title to public lands within a certain area of Mexico upon which such

states bordered, was set forth by the Secretary of State of the United States as follows:

"The discrimination in this respect between those citizens and other foreigners is still believed to be invidious, unnecessary, at variance with the treaty, and quite incompatible with those friendly relations which the obvious interest of both countries requires should be maintained between them * * *. The Mexican law of 1863 is especially invidious towards citizens of our border states because it practically discriminates against them by name and thereby stigmatizes them as unworthy to have the privilege of holding the real estate. This stigma cannot be acquiesced in by this government which does not admit the right of any foreign power to discriminate between citizens of different states of this Union who can only be known abroad as citizens of the United States. It may be that the treaty of 1831 does not expressly confer upon citizens of the parties the right to hold real estate in their respective territories nor does it provide for an equality of rights in that respect between Mexicans and our own citizens. Although the equality between citizens of the United States and other foreigners in Mexico is by the second and third articles of the treaty literally restricted to matters of commerce and navigation, *it may also fairly be construed to include a like equality in the privilege of acquiring and holding real estate.*

"It cannot be doubted that if the construction *now claimed had been anticipated* it would have been *thwarted* by *an explicit provision*. There is

believed to be no such discrimination against Mexican citizens in any law in this country."

Under the statute of Washington the government of Japan would be compelled to take the position that if two Japanese brothers should be resident in the State of Washington, one of whom was born in Japan and the other in Africa, it would have to say to the one born in Japan: "No treaty-right between this country and the United States is violated, because you were born in Japan," and to the one born in Africa: "The law of Washington permits you to acquire real estate equally with all other aliens who are of the Caucasian or African race or nativity, but your brother because born in Japan is lawfully branded by the law of Washington with the stigma of 'statutory alienage.' "

Corin v. Glenwood Cemetery, 69 Atlantic Rep. 1083.

It cannot be doubted that the Japanese government, when it entered into the treaty of 1894, and also when it entered into the treaty of 1911, knew that the United States had protested against the law of Mexico. It cannot be doubted that prior to entering into the treaty of 1911, which was concluded after the controversy in respect to the California schools, the Japanese government knew

of the position which the Secretary of State of the United States had taken in respect to the meaning of the treaty of 1894, and that while that treaty did not give affirmative rights to Japanese subjects in the California schools, its language negatived the right to make an invidious discrimination between resident Japanese aliens and other resident aliens. It is not to be assumed that when the United States made its protest against the enforcement of the Mexican law the United States was taking a legal and moral stand which it did not believe in, but to which it thought a weaker power might submit. On the contrary, it is reasonable to suppose that the United States believed that the discrimination in the Mexican law was an invidious discrimination and one which the Mexican government was not justified in making. The government of Japan, therefore, had the right to assume that the treaty of 1911 impliedly forbade any one of the states of the United States, while permitting ownership of land by resident aliens, to discriminate against Japanese subjects resident in such state by thereafter enacting a law which, had it been written into the treaty, would have effectually prevented the treaty being entered into by the government of Japan. If there is one proposition which plainly appears from the language of the

treaty of 1911 and by the declaration of the Ambassador from Japan to the United States, it is, that Japanese subjects were to stand on as high a plane and be accorded the same equality as citizens or subjects of the most favored nation. The declaration of the Japanese Ambassador, in respect to the limitation and control of the emigration of Japanese laborers to the United States, was not that the treaty controlled such emigration, but that the Japanese government was fully prepared to maintain with equal effectiveness the limitation and control which for the preceding three years it had exercised in regulation of such emigrant laborers. The Japanese government was not willing to bind itself by treaty that its emigrant laborers should stand upon a footing different from that of laborers from other countries, but that the Japanese government, as a matter of honor and not as a matter of treaty, would exercise in the future the same control it had exercised in the past. It is impossible, therefore, to believe that the treaty of 1911 would have been entered into by Japan if it had contained the provision that, notwithstanding the recital in the treaty that the two governments had resolved to enter into it in order to maintain the relations of amity and good understanding which happily existed, any state of the

United States might enact a law which would compulsorily and automatically exclude a subject of Japan resident in such state from purchasing, controlling or leasing real estate therein, while other alien residents of such state of a different race, color and place of nativity should have the option to acquire, control and lease land upon terms not permitted to the Japanese.

If the spirit of the treaty of 1911 forbids such discrimination as the law of Washington creates, then the discrimination cannot be enforced.

The President of the United States, in proclaiming that the treaty had become effective, declares that the treaty is made public "to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof."

That the statute violates the spirit of the treaty and invidiously discriminates against the Japanese is manifest.

B

THE STATUTE OF WASHINGTON DENIES APPELLANTS THE EQUAL PROTECTION OF THE LAWS AND DEPRIVES THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

1. The Japanese appellant is by the statute, because he is a Japanese born in Japan, disqualified from acquiring or leasing agricultural land in the State of Washington. Prior to the enactment of the statute there was no law of the State of Washington prohibiting an alien Japanese resident in Washington from leasing real estate for a term which would not be equivalent to a conveyance of the property; neither was there any law in the State of Washington making it a criminal offense for a citizen of Washington to convey land to an alien Japanese resident therein, nor making it an offense for such alien Japanese resident to accept such conveyance. In fact, the decisions of the Supreme Court of the State of Washington held that upon such a conveyance by a citizen to any alien the title passed out of the citizen to the alien and

the alien took a defeasible estate which could be attacked on the ground of alienage of the grantee only by the State of Washington in a proceeding to escheat the property.

Abrams v. State of Washington, 45 Wash. 327;

State ex rel. Atkinson v. World Real Estate Commerce Co., 46 Wash. 104;

In re Stixrud's Estate, 58 Wash. 339;
Prentice v. Howe, 84 Wash. 136.

The law of Washington is in accord with the law upon the subject announced by this court at a very early date in the history of the country.

Fairfax' Devisees v. Hunter's Lessee, 7 Cranch. 619.

To the same effect is the decision of the Supreme Court of California:

"Even a conveyance to an alien, disqualified under the law to hold real estate, has been generally held to convey title to such alien until the same is divested by the state by inquisition had upon its denouncement."

In *re Tetsubumi Yano's Estate*, 206 Pac. Rep. 995, 998.

The Washington statute under consideration, if valid, so changes the law that the conveyance or

lease of land made by an American citizen to an alien Japanese born in Japan and resident in the State of Washington, a crime, and the acceptance of such conveyance or lease by such Japanese a crime, and if such Japanese, having accepted a conveyance, refuses to disclose his title and interest in the property to the Attorney General of the state, he is guilty of a gross misdemeanor.

In determining whether the statute is in conflict with the Fourteenth Amendment to the Constitution of the United States, in that it denies to the appellants the equal protection of the laws because it makes an illegal discrimination against them and their property, the same question is presented as to the proper construction of the statute which was presented in the consideration of the question whether the statute was in conflict with the treaty.

If the Fourteenth Amendment to the Constitution does prohibit the State of Washington from enacting a statute discriminating between alien residents, so that alien residents of the Caucasian race and alien residents of African nativity and African descent may purchase, control and lease land by performing an act voluntary on their part without being subjected to any penalty for such

purchase or acquiring such control or making such lease, and at the same time making it a crime for alien Japanese born in Japan, resident in the State of Washington to purchase, control or lease land, then, the statute under consideration is equally forbidden by the Fourtheenth Amendment, notwithstanding the language in which such intent is sought to be concealed without defeating the same result sought to be accomplished.

"The purpose of the lawmaker in the case supposed would be openly avowed. In the case existing, it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizens should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

Cummings v. State of Missouri, 4 Wall. 277, 325.

It is true that this language was used in the great case dealing with the question of whether or not the law of Missouri requiring a test oath and punishing a person for performing certain acts

without taking such oath was void under the constitution forbidding the enactment of *ex post facto* laws. The same principle, however, is involved in the present case in determining whether the court will consider the substance of the thing done by the legislature or be controlled by the form of language which the legislature has since seen fit to adopt to disguise the true intent sought to be accomplished and actually accomplished.

In the same decision, at page 329, this court said:

"Now, as the state, had she attempted the course supposed would have failed, it must follow that any other mode producing the same result must equally fail. The *provision of the federal constitution* intended to secure the liberty of the citizen *cannot be evaded* by *the form in which the power of the state is exerted.* If this were not so, if that which cannot be accomplished *by means looking directly to the end*, can be accomplished by *indirect means*, the inhibition may be *evaded at pleasure.* No kind of oppression can be named, against which the framers of the constitution intended to guard, which may not be effected."

At page 327, the court said:

"This deprivation is punishment; nor is it any less so because a way is *opened for escape* from it by the *expurgatory oath.* The framers of the constitution of Missouri knew at the time that *whole classes of individuals would be unable to take*

the oath prescribed. To *them there is no escape provided;* to *them* the deprivation *was intended to be and is absolute* and perpetual. To make the enjoyment of a right dependent upon an *impossible condition* is equivalent to the *absolute denial* of the right *under any condition;* and any such denial enforced for a past act is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else."

The statute under consideration applies to purchases and leases made prior to the time when the statute was enacted, as well as to purchases and leases made after its enactment. It makes the enjoyment of a defeasible estate, which had been created prior to the enactment of the statute, a crime and requires the alien Japanese resident to disclose to the Attorney General of the state and the Prosecuting Attorney, evidence of the commission of such crime. It was well known to the legislature of the State of Washington, when the statute was enacted, that almost all of the Japanese residents in the state would, because of their race, color and place of nativity, be absolutely unable to escape the status of statutory alienage, because the statute required the filing of a declaration under oath which it was a matter of common knowledge such Japanese could not in good faith file, and the statute intended, by prescribing such

standard, to so exclude such Japanese residents, while at the same time alien residents of other races would be permitted by their voluntary act to escape the unenviable status to which the Japanese were by the statute consigned. The law of the United States does not forbid alien Japanese residents, born in Japan, acquiring land or leasing it, either in the District of Columbia or in the territories of the United States. The Washington statute, instead of adopting a standard permitted by the laws of the United States for the lawful purchase or leasing of property by resident aliens in the District of Columbia and the territories of the United States, deliberately adopted as a standard, for the purpose of excluding the Japanese, a prohibitive provision of the naturalization laws of the United States, so that while the Japanese would be statutory aliens automatically and compulsorily, aliens of a different race should have the option to occupy or not occupy such status at their election.

2. Under the law, a conveyance to an alien vests in the alien a defeasible estate, subject to such alien being divested of such estate at the instance only of the state.

The filing of a declaration of intention to become a citizen of the United States does not convert an

alien into a citizen. The alien remains an alien until naturalization has been completed.

"A foreign subject, who is qualified to become a citizen of the United States under Sec. 2167 of the Revised Statutes, does not become such by filing his declaration of intention so to do. That section requires that he shall renounce allegiance to the sovereignty of which he is a subject; takes the oath of allegiance to the United States, and comply with the other conditions prescribed in the second and third paragraphs of Sec. 2165 of the Revised Statutes, in order to become naturalized; and until he does so he remains a foreign subject."

City of Minneapolis v. Reum, 56 Fed. 576, 581;

In re Kleibs, 128 Fed. 656;

In re Moses, 83 Fed. 995;

Maloy v Duden, 25 Fed. 673;

In re Polsson, 159 Fed. 283;

Frick v. Lewis, 195 Fed. 693.

The statute of Washington, therefore, in dealing with foreign citizens or subjects, divides them into two classes: Upon the favored class it confers the right to remain foreign citizens or subjects and to acquire, control and lease land. It prescribes a condition which it knew and intended would exclude Japanese from entering such class

because the condition prescribed for entering such class was one with which the Japanese could not, because of his race, color and place of nativity, comply.

3. Where an estate vests, to which is attached the obligation of performance of a condition subsequent, and such performance becomes impossible without fault on the part of the grantee, the estate is freed from the condition.

Ruling Case Law, Vol. 8, Sec. 167, p. 1107;
Ruling Case Law, Vol. 28, Sec. 308, p. 320;
Davis v. Gray, 16 Wall., p. 230.

4. The condition in the act under consideration, requiring a Japanese to declare his intention to become a citizen of the United States, is the requiring of an impossible condition and, therefore, the Japanese is by law freed from the obligation to comply in order to escape the penalty of the statute.

Endlich on Interpretation of Statutes, Sec. 441.

"A command which cannot be obeyed is not law, Therefore, possible obedience is an inseparable element in every law, without which it cannot exist. So, though a command should be such as could, in general, be carried out, if in a particular in-

stance it became impossible, it would not be law for that instance."

Bishop, Noncontract Law, Sec. 156.

"Upon another question, also, the authorities agree, namely, that when the law creates a contract or otherwise casts on one a duty, he is excused if the thing becomes, in the absolute sense we are considering, impossible."

Bishop on Contracts, Sec. 595.

"To make the enjoyment of a right dependent *upon an impossible condition* is equivalent to an *absolute denial* of the *right under any condition*."

Cummings v. Missouri, 4 Wall. p. 327.

4. The act under consideration, by requiring Japanese, in order to escape its penalties and the forfeiture of their estate, to do the impossible, while requiring of all European aliens and aliens of African nativity or African descent, compliance only with the possible, conflicts with the Fourteenth Amendment to the Constitution of the United States and is void.

In re Ah Chong, 2 Fed. 733;

In re Tiburcio, 1 Fed. 481.

The statute violates the rule of law announced by this court in *Guinn v. United States*, 238 U. S.

347. The rule there announced for ascertaining the meaning of the statute is the rule which is applicable in this case. At page 364 the court said:

"Its opening sentence fixes the literacy standard, which is all-inclusive, since it is general in its expression and contains no word of discrimination on account of race or color or for any other reason. This, however, is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out changes coming under that standard from the inclusion in the literacy test, which would have controlled them but for the exclusion thus expressly provided for."

If the Washington statute had not prescribed that the filing of a declaration of intention to become a citizen of the United States should be the standard by which it should be determined whether an actual alien should or should not be a statutory alien, all aliens would have come under the provisions of the act; but by exempting those who should file such declaration from the class of statutory aliens and consigning to the class of statutory aliens compulsorily and automatically those for whom the filing of such declaration was an impossibility, there was, in effect, written into the act the proscription of the latter class.

At page 364 of the same opinion the court said:

"It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color or previous condition of servitude prohibited by the Fifteenth Amendment, but the *standard itself inherently brings that result into existence*, since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by, in substance and effect, lifting those conditions over to a period of time after the enactment to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment. And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard which is fixed other than the purpose above stated."

It is impossible to conceive of any reason for the statute making the filing of a declaration of intention to become a citizen of the United States the test for avoiding the penalties of a criminal statute, for purchasing, controlling or leasing real estate in the State of Washington, except to give

the option to aliens of races other than Japanese and similar races, the right to escape the statutory alienage created by the statute, which statutory alienage the act intended to and did impose upon the Japanese and similar races because of race, compulsorily and automatically.

Meyers v. Anderson, 238 U. S. 368, is to the same effect.

5. A plainer case of making the purchase, control or leasing of land criminal by one class of persons on account of race, color and place of nativity, and perfectly lawful by persons of a different race, color and place of nativity, although both classes are residents of the same state, would be hard to find.

The fact that such difference in race, color and place of nativity is not a sound basis for classification for the exercise of the right to purchase, control and lease land is demonstrated by the fact that the laws of the United States which exclude the race discriminated against from becoming citizens of the United States, permits such race equally with other races to purchase, control and lease land in the District of Columbia and the territories of the United States.

U. S. Stat. at Large, Vol. 29, p. 618; and 33 p. 733.

Section 1977 of the Revised Statutes is as follows:

"All *persons* within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other."

It is a subterfuge to prescribe by statute a standard to be complied with by those of the white and black races which it is possible for them to comply with on account of their race, color and place of nativity and with which it is impossible for those of another race because of such race, color and place of nativity to comply and then say that because the same thing is required of the former races an alien who is not of either such race is not denied the protection of Section 1977 of the Revised Statutes in respect to the making and enforcing of contracts.

In *Buchanan v. Warley*, 245 U. S. 60, this court, at page 74, said:

"The Fourteenth Amendment protects life, liberty and property from invasion by the states with-

out due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The constitution protects these essential attributes of property."

At page 76 of the same opinion the court said:

"While the principal purpose of the latter amendment (the Fourteenth) was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. It is now the settled law."

After quoting Sec. 1977 of the Revised Statutes the court in the same opinion, at page 78, said:

"In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it, for the sole reason that the purchaser is a person of color, intending to occupy the premises as a place of residence?"

At page 82 of the same opinion the court said:

"We think this attempt to prevent the alienation in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law."

That the statute is void under the Fourteenth Amendment because it deprives both the alien plaintiff and the citizen plaintiffs in this case of their property without due process of law and denies them the equal protection of the law, is sustained by the following cases:

Buchanan v. Warley, 245 U. S. 60, 76;

Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350, 352;

Yick Wo v. Hopkins, 118 U. S. 356;

Truax v. Raich, 239 U. S. 33, 39, 219 Fed, 273;

Barbier v. Connoly, 133 U. S. 27;

Allgeyer v. Louisiana, 165 U. S. 578, 589;

McFarland v. American Sugar Co., 241 U. S. 79;

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540;

The Slaughter-house Cases, 16 Wall. 36;

Strauder v. West Virginia, 100 U. S. 303;

Revised Statutes, U. S., Section 1977;

Carey v. City of Atlanta, 143 Ga. 192;

State v. Julow, 129 Mo. 163, 29 L. R. A. 257;

Royster Guano Co v. Virginia, 253 U. S. 412;

In re Opinion of Justice, 94 N. E. 958.

"The Fourteenth Amendment to the Constitution is *not* confined to the protection of *citizens*. It says: 'Nor shall any State deprive any *person* of life, liberty, or property without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to *all persons with the territorial jurisdiction, without regard to any differences of race, of color, or of nationality;* and the *equal protection of the laws* is a *pledge* of the *protection of equal laws.* It is accordingly enacted by Section 7977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the *same right in every State* and Territory to *make* and enforce *contracts*, to sue, be parties, give evidence, and to the full and *equal benefit of all laws* and proceedings for the *security of persons and property* as is enjoyed by *white citizens* and shall be subject to *like* punishment, pains, penalties, taxes, licenses, and exactions of every kind, *and to no other.*' "

Yick Wo v. Hopkins, Sheriff, 118 U. S. 356, 369.

Is equal protection of the law given to both when one man by reason of his race, color and place of nativity is made a criminal if he purchases, controls or leases land, so that therefrom he may eat bread in the sweat of his fact, while the other, at his option, may

by a mere declaration, because of his race, color or place of nativity, freely purchase, control or lease land to enable him to eat his bread?

Under what decision of this court can the claim be justly founded that an act, innocent in itself, may by a state law be made a crime in one because of his race, color or place of nativity, while the same act in another remains, at his option, an innocent act because of his race, color or place of nativity? We know of no such decision.

In this case the statute is not dealing with the right of a state to say who shall purchase, control or lease property of the state or any municipality of the state. Nor is any question involved of the right of the state to say that aliens of a particular class shall not work upon property belonging to the state or one of its municipalities. Nor does the case fall within the rule prohibiting aliens from hunting game belonging to the state. The question here involved is, whether a state which permits contracts of a certain character to be made by aliens, may lawfully except from the right to make such contracts a particular race of aliens who, because of their race, color and place of nativity, may not be naturalized under the laws of the United States. The question is also presented

whether a state may lawfully enact a statute depriving a citizen who is the owner of land of the right to sell or lease that land and receive the purchase money or rent therefor, although the conveyance or lease be made to a resident alien. The statute certainly deprives the citizen plaintiffs in the case at bar of their property without due process of law as effectually as the ordinance in the case of *Buchanan v. Warley* deprived the white man in that case of his property. The decision in the Buchanan case was not rested upon that provision of the Fourteenth Amendment which forbade the state to discriminate against any citizen of the United States because of race, color or previous condition. The ordinance was held invalid because in conflict with the Fourteenth Amendment, because the white man was a person and the Fourteenth Amendment forbade that a statute should deprive any person within its jurisdiction of property without due process of law. It is, we submit, unsound to claim that a statute which prescribed a standard whereby if an American citizen, the owner of land, sells or leases such land to one who is an alien under the laws of the United States he is doing only a lawful act if such alien has announced in a particular form his intention to become a citizen, while he becomes a criminal if he

makes a conveyance or leases his land to another alien because he is a Japanese and a native of Japan.

7. As the entire act applies only to the aliens subjected to its provisions and excludes all other aliens from its provisions by reason of the language of Subdivision A, Sec. 1, the entire act is invalid.

Butts v. Merchants and Miners Transp. Company, 230 U. S. 126;

McFarland v. American Sugar Company, 241 U. S. 79.

It is respectfully submitted that the decree of the District Court should be reversed, with directions to overrule the motion to dismiss and to enter a decree enjoining the enforcement of the statute because of its unconstitutionality.

Respectfully submitted,

JAMES B. HOWE,
E. HEISTER GUIE,
DALLAS V. HALVERSTADT,
Counsel for Appellants.